148 U.S. 142

RECORD, CASE No. 12,474.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 3.

MAX ROSENTHAL, APPELLANT,

vs.

KERSEY COATES, AS ASSIGNEE OF THE MASTIN BANK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED FEBRUARY 28, 1887.

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1 UNITED STATES OF AMERICA, *sct:*

Pleas and proceedings had before the circuit court of the United States for the western division of the western district of Missouri in a cause wherein Kersey Coates, assignee of the Mastin bank, is complainant and Kate Doran, Max Rosenthal, *et al.* are defendants.

In Chancery.

Be it remembered that heretofore, to wit, on the 18th day of May, A. D. 1885, and at the regular May term of said court, the following proceedings were entered upon the order book of said court, to wit:

KERSEY COATES, Assignee, &c.,
against
KATE DORAN *et al.*

This day come defendants, by their attorneys, Messrs. Scott & Taylor, and present to the court a transcript of record in the above-entitled cause, removed by change of forum from the circuit court of Jackson county, and move the court for leave to file the same, and said motion, being submitted, is sustained, and it is ordered that said transcript be filed and said cause docketed, which is accordingly done.

Said transcript is in words and figures as follows, to wit:

Be it remembered that on the 23rd day of June there was filed in the circuit court of Jackson county, Missouri, in open court a petition wherein Kersey Coates, as assignee of the Mastin bank, is plaintiff and Kate Doran *et al.* are defendants.

Said petition is in words and figures as follows, to wit:

In the Circuit Court of Jackson County, Missouri *Missouri*, at Kansas City, Missouri.

2 KERSEY COATES, Assignee of the Mastin Bank, Plaintiff,
vs.
KATE DORAN, MAX ROSENTHAL, *et al.*, Defendants.

Said plaintiff, for cause of action and relief herein, says that in A. D. 1872 the Mastin bank was incorporated under the laws of Missouri to carry on a banking business at the city of Kansas, in said county, and has been ever since said incorporation a banking corporation, located and doing business in said county, at the city of Kansas; that the Metropolitan National Bank of New York was a banking corporation organized under the national banking law of the United States, located and doing a banking business in the city and State of New York; that said Mastin bank kept an account with said Metropolitan National bank as depositor therein, getting credit in said latter bank for moneys deposited and the proceeds of

collections made on account of said Mastin bank and for all that said Metropolitan National bank became liable in the course of its banking business to pay to said Mastin bank on its demand or on its order; that said Mastin bank in the course of its business drew drafts or checks on said Metropolitan National bank from time to time in favor of various corporations and persons, expecting said Metropolitan National bank to pay the same on presentation and charge the amounts so paid in account against the said Mastin bank.

The business between said banks as correspondents as aforesaid was large, averaging or running from $20,000 to $75,000 per day; that when said Mastin bank sent any remittances to said Metropolitan National bank it charged the latter therewith, and when it drew drafts or checks it credited said latter bank therewith; that on
3 August 30, 1878, between two o'clock and 3 o'clock in the afternoon, said the Mastin bank executed, acknowledged, and delivered to said Coates a deed of assignment of that date, which said Coates then accepted, whereby said the Mastin bank transferred and assigned to said Coates all its lands, tenements, goods, chattels, effects, and credits in trust for the benefit of all its creditors in proportion to their respective claims; that said Coates has since been and still is administering such trust; that August 3d, 1878, was Saturday; that after accepting such trust said Coates notified said Metropolitan National bank thereof by telegraph, received by said latter bank before business hours on August 5th, 1878; that said latter paid no checks or drafts drawn on it by said Mastin bank after such notice was so received; that a number of said drafts were on and after August 5th, 1878, presented for payment to said Metropolitan National bank and payment refused, and the same were protested for non-payment and notice of the dishonor thereof given in due form and time to the Mastin bank; that when said Metropolitan National bank so got notice of the said assignment it had certain remittances before that received from the said Mastin bank; that thereafter said Metropolitan National bank paid to said Coates, as such assignee, on account of what it owed said Mastin bank at the time of receiving such notice, the following sums, to wit:

On Oct. 9th, 1878	$51,760 05
On Apr. 16th, 1879	7,126 69
On July 8th, 1880	3,500
Total	$62,386 74

Said Coates has not received and is not entitled to receive any other money from said Metropolitan National bank by reason of said assignment; that he collected such moneys from the Metropolitan National bank believing that he was entitled thereto, and that the funds were to be used, as other funds realized under
4 said assignment, to pay expenses of the trust and to distribute *pro rata* among all creditors of said Mastin bank, including holders of said drafts or checks, having their claims and demands

adjusted and allowed by said Coates as such assignee according to the statutes of Missouri; that he was so advised by counsel learned in the law; that after he collected such sums from said Metropolitan National bank a number of holders of said drafts or checks brought suit against said Coates as such assignee asking judgment and decrees for him to pay the amount of their checks or drafts in full out of what he has collected from said Metropolitan National bank by reason of the facts hereinbefore stated, and some on the further grounds that their drafts or checks were issued for collections made by said Mastin bank and that said Mastin bank was insolvent when said assignment was made and had been for a long time prior thereto.

That said Coates as such assignee gave due notice according to law of Missouri that on January 29th, 30th, and 31st, 1879, at a place specified in the county-seat of said county, to wit, the court-house there, he would proceed to adjust and allow demands against the trust fund in his hands as such assignee; that some, but not all, of said checks or drafts were presented for allowance and were allowed at the time and place before mentioned, the presentation being between the hours of nine o'clock in the forenoon and five o'clock p. m. on said days; said unpaid drafts of said Metropolitan National bank, omitting date, amounts, and names of persons in whose favor and signatures, are all of the following tenor, being on blank printed forms, to wit:

$—. No. —.

KANSAS CITY, MO., ——, 187–.

State of Missouri, the Mastin bank, pay to the order of ——
—— —— dollars.

—— —— *Cashier.*

To the Metropolitan National bank, New York.

Said checks or drafts were numbered with other drafts or checks consecutively. The following is a tabulated statement of all checks or drafts so drawn unpaid at the time said notice of said assignment was received by said Metropolitan bank, showing in appropriate columns the date of drawing, number, in whose favor drawn, in whose favor allowed by said Coates, if so allowed, the amount, and date of protest, if protested.

In the administration of said trust some of said checks or drafts so not paid by said Metropolitan National bank have been returned to and taken up by said Coates and are now held by him, some being surrendered in set-off of what was owing the said Mastin bank, some being given up and credited therefor, being given on balance of account, which was subsequently adjusted and allowed, and some being turned in under order of this court in compromise of bad or doubtful claims held by the said Coates as such assignee or credited on account and the account proved up and allowed as a demand against trust funds in hands of plaintiff, as hereinafter

stated. So far as said Coates now knows no claims are now made against said fund collected from said Metripolitan National bank or said assignee in respect therefor on account of checks or drafts so returned and taken up by said Coates, except as hereinafter stated.

The following list shows the numbers, amounts, and names of persons in whose favor drawn of said checks or drafts so
6 taken up by said Coates, to wit:

Draft Register.

Lists of drafts outstanding against the Metripolitan National bank.

Date of drawing.	No.	To whose order drawn.	In whose favor allowed — assignee.	Amount.
	162020			20
	162798			33 50
	444			9
	98			18 95
1878.				
March 15	186195	Kate Doran	Kate Doran	78
25	187566	E. Bain		55 25
May 21	189950	T. B. W. Corning		108 80
21	189749	Frank Jones		125
27	189982	I. D. Clapp & Co.		12 88
June 17	191043	C. W. Whitehead	B. R. Klein	81 04
11	191124	E. B. Millaet	E. B. Millet	10
11	191156	W. W. Eastbune		46 49
13	191222	Lawrence Sanchez		32
19	194504	Mrs. O. C. Day	O. C. Day	100
24	194616	Mary Fairbun		40
25	194713	Harrison and Platt		16 15
29		Sarah C. Hacks	Sarah C. Hicks	65
July 8	195221	James Hewson & Co.	James Hewson & Co.	53 61
"	195246	F. M. Shaw		131
	195247	"		200
	195248	"		25
9	195261	R. H. Hunt		100
12		Hines Pierce & Mansher	Hines Pierce	63 48
7				
July 16	195484	Henry Avis	Wm. Mulky	125
16	195485	Henry Avis	"	1 25
18	195652	C. T. Webber		85 05
18	195658	B. F. Jones, sec'ry		70
19	195671	J. Windsor	J. Windsor	100
22	195762	L. E. Pringle		5
22	195789	Harrison and Platt	Kate Doran	38 68
23	195814	C. W. Whitehead	C. W. Whitehead	56 75
"	195857	Mrs. Alfred Pertle	Harrison & Platt	24 45
24	195874	H. H. Sheppard	H. H. Sheppard	4
"	195885	D. Austin & Co.	G. S. Neff	48 22
25	195898	Mrs. Francis Albright	Mrs. E. B. Dinsworth Allowed for 4.12.	25
Aug. 1	196181	B. T. Parsons		27 06
2		" "		150 25
3		Geo. B. Yandes & Co.		9 34
4		J. B. Jones, cash.		42 70
5		Max Rosenthal		1,998
6		H. P. Cooke, cash.		81 03

Draft Register—Continued.

Date of drawing.	No.	To whose order drawn.	In whose favor allowed by the assignee.	Amount.
	7	Abernathy, North & Co.	Abernathy, N. & O.	1,578 34
	8	Abernathy, "	" "	9 77
	9	" "	" "	38 42
	90	" "	" "	45 62
	1	" "	" "	16
	2	Miss Mattie Hightower	Thornton Richards & Co.	10
	3	Theo. Stanwood, cash.	1st Nat. b'k, cur.	248 91
	4	Fred. Mullet	Fred. Mullet	40 75
	5	Fred. Mullett	Fred. Mullett	663 17
	6	M. A. Patrick	Trumball, Re & Allen	12
8				
Aug. 1	7	Dogett & Smith	Dogett & Smith	2,104 84
	8	Gardner & Co.	Gardner & Co.	58 81
	9	Geo. J. McGurkey		240 28
	200	Nofsinger & Co.	Nofsinger, Harper & Co.	125
	1	H. & L. Chase	H. & L. Chase	2,000
	2	P. Nimrod	Geo. D. Huling	42
	3	Jos. A. Jeffries & Co.		127 67
	4	J. C. Meyers	J. C. Meyers	150
	5	Jas. C. Moore, cash.		8,000
2	6	Mrs. D. H. Hines	Mrs. D. H. Hines	25
	7	Corbin Banking Co.	Hober & Doubleday	1,000
	8	Central National bank	Emp. Nat. bank	5,000
	9	Bank of N. Am.	Reno County State b'k	2,000
	10	Gilman, Sons & Co.	Dayton, Barber & Co.	1,000
	1	Anderson, Childes & Co.		4,000
	2	Kouretze Bros.	Liebold, Fisher & Co.	8,000
	3	L. S. Lawrence & Co.	L. S. Lawrence & Co.	1,975
	4	D. Austin & Co.	D. Austin & Co.	329 16
	5	Dr. W. M. Hammond	W. M. Hammond	40
	6	Swenson Sons & Co.		99 75
	7	D. C. Lovit, cash.	State Bank West Va.	49 75
	8	H. P. Dorennes, cash.		577 52
	96219	H. Colville, cash.	Com. B'k, Cin., O.	1,979 50
	20	Annie Baldwin, cash.	3d Nat., Cinat., O.	586 71
		Johnston & Cheek	H. F. Binghart	116 80
	2	Impt. & Trad. Nat.	3d Nat., Nashville	410 80
	3	John S. Martin	J. S. Martin	84 90
	4	J. H. Lindebarger		39 50
	5	M. H. Dickenson	M. H. Dickenson	500
	6	Jos. Cahn & Co.		4 46
9				
Aug. 2	7	C. H. Prescott ac't	G. H. Nettleton, R.	200
	8	M. C. Sharp	Harrison & Platt	23 65
	9	Aldemania Fire Ins. Co.	Payee	61 78
	30	J. W. Hobbins, G. A.		90 40
	1	H. L. Marmer P. T. Al	low T. J. Baird for 79.60	274 50
	2	W. C. Browning & Co.	W. C. B. & Co.	632 50
	3	Annie Baldwin, cash	3rd Nat., Cin., O.	264 82
	4	2d Nat., Springfield, O.		895 83
		Total		$81,884 60

In the column of date, if protested, the figures means days in August, 1878, except when otherwise mentioned, when they mean days in September, 1878.

Lists of Drafts on the Metripolitan National Bank Held by Assignee.

Name.	No.	Amount.
E. B. Millett	191,124	10
R. H. Hunt	195,261	100
Geo. W. Hopper	195,296	1,300
Brodenbugh & Co.	195,904	77 89
T. J. Bigger	195,936	75
J. E. Forber	195,983	17
A. Sarvier, cash.	196,032	37
Lathrop and Smith	196,037	91 05
Chas. Doan	196.049	66
Oriental bank	196,081	1,000
Phil. Doffler	196,133	40 40
H. J. Latshaw	196,137	413
7th Ward Savings	196,155	184 25
F. J. Baird	196,147	195 14
10 B. T. Parsons	196,181	27 06
" "	196,182	150 25
Geo. J. McGurkey	196,199	240 28
Not taken up but paid.		
J. C. Moore	196,205	8,000
Not payable but taken up.		
Leobold Feibor & Co.	196,212	3,000
Swenson Son & Co.	196,216	99 25
Importers' and Traders' B'k	196,222	410 80
Jos. Cahn & Co., 196	196,226	4 46
C. H. Prescott	196,227	200
M. C. Sharp	196,278	23 65
H. L. Parmer	196,231	274 50
—— Jones	195,658	70
"	196,053	14 70
—— Richards	196,139	2,000

Said Coates out of funds in his hands paid two dividends, one of twelve per cent. and one of five per cent. on all claims allowed, and to all holders of said checks or drafts so allowed nothing else has been paid to knowledge of plaintiff, or any other of said drafts, and the holders claim judgment out of what plaintiff so collected from said Metripolitan National bank. The only exception to last statement is *is* that plaintiff has paid judgments and decrees as hereinafter stated.

Suits on said checks or drafts before mentioned were brought as follows in this court, some of which were removed to the circuit court of the United States for the western division of the western district of Missouri:

Henry S. Chase and Lincoln Chase, partners as H. & L. Chase, on No. 196,701, for two thousand dollars, and No. 196,129, for two hundred and fifty dollars.

11 Commercial Bank of Columbus, Ohio, on No. 196,203, for $127.67.

George W. Jones, on No. 196,109, for $126.43; No. 196,110, for $135.07; No. 196,111, for $96.89; No. 196,113, for 70.95; No. 196,115, for $91.20.

Chatham National bank, on No. 196.218, for $577.52.

M. W. Anderson, Cornelius C. Chiles, Henry C. St. Clair, and Wm. Hughes, on No. 196,211, for $4,000. This check or draft is one of those surrendered to and held by said Coates.

M. H. Dickenson, on No. 196,225, for $500.00.

Commercial Bank of Cincinnati, Ohio, on No. 196,219, for $1,979.50.

Reno County State bank, on No. 196,138, for $2,000, and No. 196,209, $2,000.

Third National Bank of Cincinnati, Ohio, on No. 196,233, for $264.82; No. 196,220, for $586.71; No. 196,160, for $37.50.

1st National Bank of Cincinnati, Ohio, on No. 196,164, for $714.95; on 196,158, for 180.08; on No. 196,193, for $248.91.

Merchants' National Bank of Louisville, on No. 196,159, for $115.63; No. 196,224, for $39.50.

Alexander M. Black, Robert Bole, James M. Bailey, J. N. Anderson, Daniel Davis, John B. Danley, Samuel Emart, D. Hostetter, John F. Jennings, Alexander King, William D. King, Allen Kirkpatrick, R. H. King, Henry Loyd, Andrew Miller, Thomas McConce, W. G. McCullough, Abde McClure, John J. Pettet, John R. Richer, Wm. Reese, George W. Smith, P. Smith, Adam Schnell, Thomas Smith, D. B. Sutton, J. J. Sant, Daniel Wallace, R. K. Wilson, and B. Young, on No. 196,108, for $351.39.

William Mulkey, on No. 195,484, for $125, and on No. 195,485, for $125.

Suits were brought on drafts or checks so drawn on the circuit court of the United States for the western division of the western district of Missouri as follows:

The Second National Bank of Springfield, Ohio, on No. 196,234, for $832.83.

The People's National Bank of Ottawa, Kansas, on No. 196,168, for one thousand dollars. This check or draft is one of those
12 surrendered to and held by the said Coates as assignee.

So far as said suit- have been tried and disposed of they have resulted as follows: In said circuit court of United States in and for the western division of western district of Missouri, $1,633.34 and costs of suit.

The 1st National Bank of Cincinnati, Ohio, on the drafts or checks it sued on, for $1,096.98 and costs.

The Reno County State bank, on the checks it sued on, for $3,300.06 and costs.

The 3d National bank, on the checks or drafts it sued on, for $734.07 and costs.

The Second National Bank of Springfield, O., on the check or draft it sued on, for $1,019.44 and costs.

The 1st four cases above mentioned that have gone to decree were removed to said circuit court of the United States from this court. In this court said Alexander Black and others got a judgment for $289.99 and costs on said check No. 196,108, and said Commercial

Bank of Col., O., got judgment for $127.65 and costs on the check or draft it sued on; said Henry S. Chase and Lincoln Chase got judgment in this court on said checks Nos. 126,129 and 126,201, for $20,000 and $250, for $2,452.50 and costs.

Said M. H. Dickenson got judgment in this court on said check No. 196,225 for $500 in amount of $530.32 and costs.

Said Wm. Mulkey got judgment in this court for *for* $265.92 and costs on said checks or drafts No. 195,484 and No. 195,485 for $125 each.

Said last-mentioned judgments were 1st rendered and were appealed to the Supreme Court, where they are now pending, this plaintiff giving bonds, with security, to the approval of this court for such appeals and to stay execution of such judgment. Said appeals were taken under advice of counsel, the request of many
13 general creditors of said trust, because there was very grave doubt whether the judgments were sound in law.

The suits that have not gone to judgment or decrees are still pending and undisposed of and undecided.

The funds collected by said assignee, plaintiff herein, he has always kept on hand to abide the event of said suits and to meet demands that might be made on account of checks or drafts embraced in said suits.

That since the rendition of said decrees by the circuit court of the United States holding the same way that this court in respect to paying out the funds so collected from the said Metropolitan National bank and the liability of plaintiff herein to account and pay such money to holders of said checks or drafts the holders of many of said checks have demanded of plaintiff that he pay their checks or drafts in full out of what he so collected from said Metropolitan National bank, and all others will so claim as soon as advised on the making of said decisions. The decrees and judgments aforesaid have all been that plaintiff pay the amounts thereof in full out of any funds in his hands as such assignee in preference to all other claims. No decision has been made by either of said courts as to the order in which said checks or drafts should be paid if plaintiff does not have enough so collected from said Metropolitan National bank to pay in full, whether same shall be paid in order in which they were drawn, which is indicated by their numbers, the lowest number being the 1st drawn and the others being drawn afterwards in the order of their numbers, or whether same shall be paid in the order on presentation thereof for payment to said Metropolitan National Bank of New York or whether what plaintiff so collected from said Metropolitan National bank should be divided *pro rata* among all the holders of said checks or drafts.

14 Though plaintiff disclosed all the facts he could to enable said courts to decide such points—

Both said courts have decided that the presentation of said checks or drafts for allowance by plaintiff and his allowance thereof and payment of dividends does not preclude the holders of said checks or drafts from claiming payment out of the funds so collected by said plaintiff from said Metropolitan National bank.

In all the decrees and judgments mentioned interest has not been allowed the holders of checks or drafts except in the three cases pending on appeal in the Supreme Court. Said cases in the Supreme Court will not be reached in that court before the next term.

In all that plaintiff has done in the premises he has acted in good faith to discharge his duty as assignee, and he should not have done any less.

All said judgments and decrees not appealed to the supreme court of Missouri, including costs, have been paid in full by plaintiff out of trust funds in his hands and the payments so made amount to $8,656.00.

So far as ownership of said drafts unpaid in not hereinbefore disclosed, same are owned as follows:

No. 196,102 by the German Exchange Bank of New York; No. 196,144 by Citizens' National bank, Louisville, Kentucky, the last two being corporations; No. 195,154 by Merchants' National Bank of Providence, R-ode Island; No. 196,186 by Fourth National Bank of Cincin-ati, Ohio, parties defendant named in caption of petition as corporations, or partners, or copartners, or partners as alleged in such caption. The 1st National Bank of Ottawa, Kansas, sued the plaintiff herein in the circuit court of the United States for
15 the western division of the western district of Missouri on June 21st, 1881, to obtain a decree for payment in full of its draft No. 196,141, for $3,000 *dollars*, which suit is pending.

The check No. 196,199, for $240.28, was in favor of cashier of said Metropolitan National bank for a collection made for it, and that collection was charged against said Mastin bank, and such check has been in fact paid, and the holder is not entitled to anything on account thereof out of the funds held by said Coates as assignee.

Max Rosenthal, holder of the check No. 196,185, for $1,998, sued said Metropolitan National bank in New York, and the suit went by removal into the circuit court of the United States for that district of New York embracing the city of New York, the object of the suit being to obtain payment of such check out of the funds held by said Metropolitan National at notice to it of such assignment. Plaintiff herein was a party to such suit by said Rosenthal, which was in chancery, and claimed the funds under said assignment against said Rosenthal, and said circuit court in New York decreed that said Rosenthal was not entitled to payment of his said check out of said funds as against said Metropolitan National bank or this plaintiff, which decree is still in force.

Elijah Gates, State treasurer of Missouri, deposited over one thousand dollars in money which he got and held as such treasurer in said Mastin bank, on which deposit there was when said assignment was made and still is due him from said Mastin bank more than plaintiff collected herein from said Metropolitan National bank, and said Gates claims a preference to all others for payment of what is due him out of all assets in hands of plaintiff as such assignee, including what was collected from said Metropolitan Na-

tional bank. Plaintiff cannot now tell whether or not he
16 will realize enough from other assets to pay said Gates in full if he be entitled thereto.

The liabilities of said Mastin bank allowed by plaintiff as assignee amount to about $1,500,000, and assets belonging to the trust in hands of plaintiff will not realize that much. The funds so collected from said Metropolitan National bank not paid away as aforesaid by judgments and decree before mentioned are in the hands of plaintiff in Jackson county, Missouri, and constitute personal property within the jurisdiction of this court, and the immediate object of this suit is the enforcement and establishment of lawful rights, claims, and demands to and against such personal property, which now amounts to $53,730.74. Part of defendants herein are non-residents of the State of Missouri, and the ordinary process of law cannot be served upon them within this State. Said non-resident defendants are as follows, to wit: Kate Doran, E. Bain, T. B. W. Corning, B. R. Keim, Lawrence Sance & Mary Fairburn, Sarah C. Hicks, F. M. Shaw, Hines, Pierce and Munshawer, C. T. C. Webber, Charles Dunwoody, J. Windsor, E. B. Dinsmore, Wm. B. Todd, cashier; F. M. Cottrell, D. S. Gordon, Israel Matson, John S. Park, 1st National Bank of Portland, Maine, Sanford and Gray, Merchants' National Bank of Lowell, Mass.; 1st National Bank of San Francisco; Appleton National Bank of Lowell, Massachusetts; John S. Martin, Equitable Life Insurance Company of New York, Dayton, Barber and Co., J. V. Brinkman and Co., Anderson savings bank, Henderson, Kahn and Co., Redway, Burton and Co., R. Sellars and Co., Dodridge and Davis, 1st National Bank of Worcester, Massachusetts; Casco National bank, Portland, Maine; Goodyear Rubber Co., New York; German Exchange Bank of New York, J. C. Allen, H. H. Baker, sect.; Jacob S. Merrill, Dan. Talmage and Sons, 1st National Bank of Pittsburg, H. & L. Chase, Bradley Manufacturing Company,
Bigelow and Shaw, 1st National Bank of Attowa, Donnell,
17 Lawson & Co., Citizens' National Bank of Louisville, Kentucky; City b'k, Dallas, Texas; Fifth National bank, Pittsburg; German National bank, Cincinnati; Lafayette bank, Cincinnati; Merchants' National bank, Providence, Rhode Island; J. W. O. Grady, H. & L. Daggott & Co., Armstrong Bros. & Co., J. B. Naylor, George Gilroy, George R. Curtiss, treas. Peoples' National bank, Ottawa; Merchants' National bank, Indianapolis; Allegany National bank, Pittsburg, Pennsylvania; St. Nicholas National bank, New York; Wilmer and Rogersnew Co., George B. Yansey, cash.; Covington National Bank of Covington, Kentucky; Max Rosenthal, Fourth National bank, Cincinnati, Ohio; Thornton Richards, Fred. Mullett, J. C. Mayer, D. H. Haines, Hobert and Doubleday, Emporia National bank, L. S. Lawrence and Co., W. M. Hammond, State bank, West Virginia; Chatham National bank; Third National bank, Nashville, Tennessee; Alemania Fire Insurance Company, J. H. Hubbins, G. A. W. C. Browning & Co.

Plaintiff cannot give names of owners or claimants of said checks or drafts more particularly than above stated.

Said plaintiff here offers to pay and dispose of the balance of the

moneys in his hands collected from the said Metropolitan National Bank of New York as this court may order and direct and seeks to be protected against the many adverse claimants thereto. To the end, therefore, for the purpose of avoiding a multiplicity of suits, of saving a large amount of costs and expenses, and that equal justice may be administered in the distribution of the trust fund hereinbefore mentioned as received from the Metropolitan National Bank of New York, this plaintiff prays the judgment and order of this court as follows:

1st. Whether said fund belongs to the general fund in the hands of the assignee and as such is to be distributed among the general creditors of the Mastin bank.

2nd. Whether the holders of the drafts draw- by the Mastin
18 bank on the Metropolitan National Bank of New York have any lien upon or are entitled to said trust fund, and, if so, in what manner said fund is to be distributed among said draft-holders—whether *pro rata* in the order of the date of the number of drafts, in the order of their presentation for payment to the drawee, or otherwise.

3d. That the several draft-holders who have commenced and are now prosecuting suits against this plaintiff, as hereinbefore set forth, be enjoined during the pendency of this suit and thereafter perpetually from maintaining or prosecuting said suits.

4th. And for such other and further relief in the premises as may be deemed by this court meet and agreeable to equity.

PRATT, BRUMBACK & FERRY,
Att'ys for Plaintiff.

On the 11th day of October, 1881, during the regular October term, 1881, of said circuit court, Max Rosenthal, one of the defendants in the above-entitled cause, filed the following answer in this cause, to wit:

COUNTY OF JACKSON, } *ss*:
State of Missouri, }

Jackson Circuit Court, at Kansas City, October Term, 1881.

KERSEY COATES, as Assignee, Plaintiff,
vs.
KATE DORAN *et al.*, Defendants. } No. 1369.

The defendant Max Rosenthal, for his separate answer to the plaintiff's petition, states:

1st. That he admits that he brought suit in the *in the*
19 State of New York on his said draft, No. 196,185, for $1,998; that the plaintiff was a party to said suit, and that said suit was decided and judgment given against the claim of this defendant therein made.

II. That suit was a proceeding in chancery by this defendant and against the Metropolitan National Bank of New York and the

plaintiff herein to have his draft paid in full out of the funds mentioned in the plaintiff's petition which *was* held by said Metripolitan bank and belonged to the Mastin bank at the time of the failure of said Mastin bank, said draft having been drawn and delivered to the defendant by the Mastin bank on the Metripolitan National bank and against said fund so held by said Metripolitan National bank at the time of the failure of the Mastin bank.

III. That said judgment was rendered against this defendant by the United States circuit court for the southern district of New York, and that the question involved in the said suit and so decided by said court against this defendant was whether or not this defendant was entitled to the payment in full of his draft out of said fund, and that was the only question involved there and the only question decided by said court.

IV. That the amount involved in said suit was less than $5,000.00, to wit, $1,998; wherefore an appeal cannot be taken from said decision and judgment.

V. That the decision of this court on exactly the same question as that involved in said suit, to wit, the right of holders of drafts drawn by the Mastin bank against said fund in the hands of the Metripoliton National bank to payment of the same in full out of said funds in the hands of the assignee, *have* been decided in favor of the said holders of said drafts, and that the decision of the United States circuit court for the western district of Missouri, wherein Justice Miller, of the United States Supreme Court, gave the opinion, has been the same upon said question as the decision of this court.

VI. Wherefore this plaintiff prays the court that his said draft for $1,998.00, herewith filed, with protest, fees, and interest, be received and allowed, and that payment of the same be made out of said fund as may seem to this court just and proper.

SCOTT & TAYLOR,
Att'ys for Defendant Max Rosenthal.

The draft attached to said answer of Max Rosenthal is in words and figures as follows, to wit:

$1,998.00. No. 196,185.

KANSAS CITY, MO., *Aug.* 1*st*, 1878.

State of Missouri, the Mastin bank, pay to the order of Max Rosenthal nineteen hundred and ninety-eight dollars.

JOHN J. MASTIN, *Cashier.*

To Metripolitan National bank, New York.

Endorsed: Max Rosenthal. Exhibit No. 1 A. A. B., referee.

The protest notice is as follows, to wit:

UNITED STATES OF AMERICA,
State of New York, City and County of New York, } ss:

On the 5th day of August, 1878, at the request of Max Rosenthal, I, Joseph I. Stein, a notary public, of the State of New York, duly commissioned and sworn, did present the original draft hereto annexed to the Metripolitan National bank, in the city of New York, and demanded payment, who refused to pay the same, the paying teller saying, "Not good."

21 Whereupon I, the said notary, at the request aforesaid, did protest and by these presents do publicly and solemnly protest, as well against the drawers and endorsers of said draft as against all others whom it doth or may concern, for exchange or re-exchange and all costs, damages, and interest already incurred and to be hereafter incurred for the want of payment of the same.

This done and protested in the city of New York aforesaid in the presence of John Doe and Richard Roe, witnesses.

In testimonium veritatis.

[SEAL.] J. J. STEIN,
Notary Public.

UNITED STATES OF AMERICA,
State of New York, City and County of New York. }

I, Joseph I. Stein, a notary public, of the State of New York, duly commissioned and sworn, do hereby certify that on the 5th day of August, 1878, notice of the protest of the before-mentioned draft was served upon the Mastin bank, Kansas City, Mo.; the Metripolitan National bank, 110 Br'way, N. *W.* city; Max Rosenthal, 26 Lisme St.

J. I. STEIN.

Attached to the said answer is the following affidavit:

STATE OF NEW YORK,
City and County of New York. }

Max Rosenthal, being duly sworn, says that he is the Max Rosenthal named in the annexed draft of the Mastin bank for $1,998.00; that he is the owner of said draft, and that the whole amount thereof is due, owing, and payable by the said Mastin bank to defendant; that there are no offsets, credits, or payments against the same, and the full amount of $1,998.00, with interest from

22 the 1st of August, 1878, is now due and payable to deponent.

MAX ROSENTHAL.

Sworn before me this 2d day of June, 1881.

PATRICK J. CHEEVERS,
[SEAL.] *Notary Public* (117), *N. Y. Co.*

On the 10th day of February, 1885, during the regular October term, 1884, of the said circuit court, the following proceedings were made of record in this cause, to wit:

KERSEY COATES, Assignee,
vs.
KATE DORAN *et al.* } 1369.

Now, at this day, comes plaintiff, Kersey Coates, assignee, by attorney, and defendant Max Rosenthal, by his attorney, and defendant Max Rosenthal files petition, affidavit, and bond for removal of this cause into the circuit court of the United States, and upon consideration the court approves said bond and orders that this cause as to defendant Max Rosenthal be transferred to the circuit court of the United States in and for the western division of the western district of Missouri.

The petition for removal of this cause is in words and figures as follows, to wit:

In the Circuit Court of Jackson County, State of Missouri, at Kansas City.

KERSEY COATES, Assignee, Plaintiff,
vs.
KATE DORAN and MAX ROSENTHAL *et al.*, Defendants.

Your petitioner respectfully shows that he is a defendant in the above-entitled cause and that the same was commenced by
23 said Kersey Coates, assignee, nominally plaintiff herein, on the 23rd day of June, 1881, in the circuit court of Jackson county, Missouri, and that your petitioner was at the time said suit was brought and still is a citizen of the State of New York and a resident thereof.

Your petitioner further shows that *that* there is and was at the time said suit was brought a separate controversy between your petitioner and the said plaintiff, Kersey Coates, a citizen of the State of Missouri and a resident thereof; that there can be a final determination of the controversy, so far as it concerns your petitioner, without the presence of the other defendants as parties hereto.

That said suit is brought by said plaintiff, Kersey Coates, and is in the nature of a bill in equity for the purpose of determining to whom and in what manner he shall pay a fund in his hands held by him as assignee of the Mastin Bank of Kansas City, Missouri, and the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs.

Your petitioner further represents that said suit is now pending for trial in this court, and that your petitioner further represents that he desires to remove the same into the circuit court of the United States in and for the western division of the western district of Missouri, in pursuance of the act of Congress in that behalf provided, to wit, the Revised Statutes of the United States 639, subdi-

vision 3. Your petitioner further states that he has filed the affidavit required by law, the statute aforesaid in such cases, and offers herewith his bond, executed by himself and Joseph Lorie as security, in the penal sum of five hundred dollars, conditioned as by said act of Congress required. Your petitioner therefore prays that said bond may be accepted as good and sufficient according to said
24 statute, and that the said suit may be removed into the said circuit court of the United States in and *aforesaid* western division of the western district of Missouri pursuant to said statute in such case made and provided, and that no further proceedings be had in this court; and your petitioner will ever pray.

MAX ROSENTHAL.

STATE OF NEW YORK,
County of New York, City of New York, } *ss:*

I, Max Rosenthal, being duly sworn, do say that I am one of the defendants in the above-entitled cause; that I have reason to believe and do believe that from prejudice and local influence the defendant Max Rosenthal will not be able to obtain justice in said State court.

MAX ROSENTHAL.

Subscribed and sworn to before me this 7th day of February, A. D. 1885.

[SEAL.] JOHN A. MAPES,
Notary Public, N. Y. Co.

The bond for removal in this cause is in words and figures as follows, to wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City, to October Term, 1884.

KERSEY COATES, Assignee,
vs.
KATE DORAN *et al.* } Bill in Equity.

Bond for Removal.

Know all men by these presents that we, Max Rosenthal, as prin*ciple*, and Joseph Lorie, of Kansas City, Mo., as surety, are held and firmly bound unto Kersey Coates, assignee, or his as-
25 signs, in the penal sum of three hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, by these presents.

The condition of this obligation is such that *that* if said Max Rosenthal shall enter and file in the circuit court of the United States in and for the western division of the western district of Missouri on the 1st day of its next session to be held copies of all process, pleadings, depositions, testimony, and other proceedings in a certain

suit or action now pending in the circuit — of Jackson county, Missouri, at Kansas City, in which Kersey Coates, as assignee, appears as plaintiff and Kate Doran, Max Rosenthal, and others appear as defendants, and shall do such other appropriate acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court into the said United States court, then this obligation shall be void; otherwise of force.

Dated this 7th day of January, A. D. 1885.

MAX ROSENTHAL. [SEAL.]
JOSEPH LORIE. [SEAL.]

STATE OF MISSOURI, } ss:
County of Jackson, }

I, Joseph Lorie, of said county, the surety named in the foregoing bond, being duly sworn, do say and depose that I am a resident of the State of Missouri and a property-holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution, and that I have property in the State of Missouri liable to execution of the value of more than five hundred dollars.

JOSEPH LORIE.

26 Subscribed and sworn to this 10th day of February, A. D. 1885.

[SEAL.] WILLIAM J. SCOTT,
Notary Public.

Commission expires July 17th, 1888.

STATE OF MISSOURI, } ss:
County of Jackson, }

I, L. F. McCoy, clerk of the circuit court of Jackson county, Missouri, do hereby certify that the foregoing is a true and complete copy of the petition, answer of Max Rosenthal, and the petition, affidavit, and bond for the removal of this cause into the circuit court of the United States as the same appears of record and on file in my office.

In witness whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court, at office, in Kansas City, this 5th day of May, A. D. 1885.

L. F. McCOY, *Clerk,*
By D. M. McCLANAHAN, *D. C.*

Afterwards, to wit, on the 27th day of May, A. D. 1885, the following entry appears of record, to wit:

KERSEY COATES }
against }
KATE DORAN *et al.* }

This day come defendants, by their solicitors, Messrs. Scott & Taylor, and, by leave of court, file amended answer herein.

Said amended answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City, May Term, 1885.

KERSEY COATES, Assignee, *vs.* MAX ROSENTHAL, KATE DORAN, *et al.* } In Chancery. Amended Answer of Defendant Max Rosenthal.

27 I. The amended answer of Max Rosenthal, one of the defendants to the bill of complaint of Kersey Coates, assignee of the Mastin bank, answering for himself severally says this defendant, now and at all times hereafter reserving to himself all manner of benefit or advantage of exception to the many errors and insufficiencies in the said bill of complaint contained, for answer thereto or unto so much or such parts thereof as this defendant is advised is material for him to make answer thereto, answers and says that he admits the matters and things set forth in plaintiff's petition except in so far as the same are hereinafter denied.

II. Defendant denies the allegation in plaintiff's petition contained commencing on page 16 of plaintiff's bill (as shown on transcript in this court) at "plaintiff herein was a party to such suit" and ending on the same page at "which decree is still in force."

III. That defendant admits that he brought a suit in the circuit court of the United States for the southern district of New York on his said draft No. 196,185 against the Metropolitan National bank, the holder of said fund; that the Metropolitan National bank, the holder of said fund, filed a demurrer for want of equity to said bill; that Kersey Coates, assignee, also appeared and filed a demurrer for want of equity to said bill; that the said bill in the said suit simply asked that the court declare that the fund in the hand of the Metropolitan National bank belonged to Rosenthal, and that the court decree that the Metropolitan National bank pay said fund to said Rosethal, divested of any lien of the Mastin bank or Coates, assignee.

In the said cause his honor Judge Blatchford, in passing on said demurrers, used the following language: "The question presented for decision is whether the Metropolitan National bank ought to pay the $1,998.00 which it owes as a debtor to the plaintiff"—
28 in other words, whether a suit can be maintained on a draft or check by the holder before acceptance against the drawee—and this was the only question there in issue or decided.

IV. That all the other defendants or draft-holders made party to this suit or having brought suit, as alleged in plaintiff's bill, have been paid the amount of their drafts in full since the commencement of this suit, and that this defendant has been paid neither dividend nor any part of the amount of his said draft.

V. That defendant's said draft was issued to him by the said Mastin bank and the consideration therefor, namely, the sum of nineteen hundred and ninety-eight dollars, was paid by him in cash

over the counter of said bank at the time he received said check or draft; that the said draft was issued to defendant and the same was presented for payment and protested for non-payment prior to more than fifty per centum of the drafts, allowed and paid in full as aforesaid out of said fund; that sufficient of said fund to pay said draft and interest thereon still remains.

Wherefore your orator prays the judgment of this honorable court that his said draft for $1,998.00, with protest fees and interest, be allowed and paid out of said fund, and that he have judgment against the plaintiff herein in said sum of nineteen hundred and ninety-eight dollars and protest fees and interest from August 5th, 1878, and for what other and proper relief in the premises as may be deemed by this court meet and agreeable to equity.

MAX ROSENTHAL,
By WILLIAM J. SCOTT,
His Attorney.

And afterwards, to wit, at the October term of said court and on the 2nd day of November, A. D. 1885, the following entry appears of record:

29

KERSEY COATES, Assignee,
against
KATE DORAN *et al.*

Now comes the complainant, by his solicitors, and files motion to remand the cause to the State court, and also suggests to the court a diminution of the record as certified to this court.

Said motion to remand is as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

KERSEY COATES, Assignee,
against
KATE DORAN, MAX ROSENTHAL, *et al.* } No. 997.

The complainant hereby moves that *that* the above cause be remanded to the circuit court of Jackson county, Missouri, and for cause of such motion says:

1. That the application for said removal was not made before the trial or final hearing of the said cause or before or at the term at which said cause could first be tried and before the trial thereof.

2. That the said defendant, Max Rosenthal, has not entered in the court copies of all process, pleadings, depositions, testimony, and other proceedings in the cause concerning and affecting him, as provided in the act of Congress.

KERSEY COATES, *Assignee,*
By T. A. FRANK JONES,
His Solicitor.

Said suggestion of diminution of record is as follows:

30 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

KERSEY COATES, Assignee,
against
KATE DORAN, MAX ROSENTHAL, *et al.* } No. 997.

The complainant herein says that this suit ought not to proceed further in this court for the reason that the copy of the record of this cause in the circuit court of Jackson county, Missouri, entered by the defendant Rosenthal is not complete and does not show that the said cause proceeded to final trial, hearing, and judgment in the said Jackson county circuit court as complainant states the fact to be.

KERSEY COATES, *Assignee*,
By T. A. FRANK JONES, *Solicitor*.

And on the 9th day of November, 1885, the following entry appears of record, to wit:

KERSEY COATES, Assignee,
against
KATE DORAN *et al.*

This day comes complainant, by his solicitors, Pratt, Brumback & Ferry, and by leave of court withdraws his motion to remand heretofore filed in this cause and suggests to the court a diminution of the record as certified from the State court and moves the court for a certiorari for a full, true, and perfect record of the pleadings and proceedings herein, and said motion, being submitted, is granted, and it is ordered that a writ of certiorari issue to the clerk of the circuit court of Jackson county, commanding him to forthwith make and certify to this court a full, true, and perfect transcript of
31 the record, pleadings, proceedings, process, depositions, and testimony in any way affecting or concerning the defendant Max Rosenthal in the above-named cause.

And on the 28th day of May, 1886, the following entry appears of record, to wit:

"KERSEY COATES, Assg.,
against
KATE DORAN *et al.*

This day there is filed in this cause a portion of certain records & agreements stipulated by the parties to this cause to be used in lieu of the entire records from the State court."

It is hereby stipulated and agreed that the following portions of the record in the case of Coates *v.* Doran *et al.*, Max Rosenthal, in the circuit court of Jackson county, may be substituted in lieu of the entire record called for:

I. Reply of Coates to answer of defendant Rosenthal, in the circuit court of Jackson county, Missouri, at Kansas City.

In the Circuit Court of Jackson County, Missouri, at Kansas City.

KERSEY COATES, Assignee of the Mastin Bank,
against
KATE DORAN *et al.*, Defendants. } No. 1369.

The plaintiff, for reply to the separate answer of defendant Max Rosenthal, filed herein, denies each and every allegation therein contained and prays judgment.

PRATT, BRUMBACK & FERRY.

II. The general form of the verdict and judgment as to the other defendants and the whole of that portion thereof referring to Rosenthal, it being conceded that the judgment is one entire judgment, and that all the other parties thereto have been paid the
32 amount of their claims except said Rosenthal; it is admitted that Coates, assignee, at the time of the trial of this cause, had a sufficient fund returned from the Metropolitan National bank to pay all the outstanding drafts.

The judgment generally was to the effect that all of said draftholders be paid the amount of their claims in full from the fund received from the Metropolitan bank, on which the drafts of claimants were drawn, and as to the said Rosenthal is as follows:

"Whereupon this cause comes on for hearing on the pleadings and testimony, the plaintiff and all defendants who have answered appearing by their respective attorneys, and those defendants who have not answered making default, and as to them it is considered that plaintiff have judgment by default. On consideration the court finds facts as follows, to wit:

"That Max Rosenthal, who held check or draft No. 196,185, for $1,998.00, had a suit in chancery in the circuit court of the United States for the district of New York, embracing the city of New York, as in the petition and answer of said Rosenthal alleged, and that a final decree was rendered therein against said Rosenthal, as stated in the petition, and that by reason thereof said Rosenthal is precluded from any relief herein against the plaintiff herein or the fund so in his hands.

"It is decreed by the court that Max Rosenthal be barred from all claim on his said check or draft, No. 186,195, for $1,998.00, or against said fund in the hands of said assignee, and that he take nothing as owner of such draft from such fund as one entitled to be paid in full, but the right is reserved to him to apply for allowance of his demand on such $1,998.00 check as a general claim against trust funds in the hands of said assignee, his right, if
33 any, to said allowance to be passed upon as if he was not a party hereto."

To which finding and decree said Rosenthal excepts, and within four days thereafter filed his motion for a new trial, supported by affidavits, which are as follows:

STATE OF MISSOURI, } ss:
County of Jackson, }

Jackson County Circuit Court, October Term, 1881.

KERSEY COATES, as Assignee, } No. 1369.
against
KATE DORAN *et al.*

Now comes the defendant Max Rosenthal and moves the court to set aside the findings and judgment herein and to grant him a new trial for the reasons that—

1. There was a mistake of himself and of his attorneys in the trial of this action as to the facts, whereby an improper finding was had herein.
2. The finding of the court was contrary to the law in the case.

SCOTT & TAYLOR,
Attorneys for Max Rosenthal.

KERSEY COATES, Assignee, }
versus
KATE DORAN *et al.* }

Affidavit in Support of Motion for New Trial, Max Rosenthal.

William J. Scott, attorney for Max Rosenthal, one of the defendants in the above-entitled cause, being sworn, upon his oath says that prior to the trial of this cause and in ample time to receive a reply from New York, Scott & Taylor, of which firm affiant
34 is a member, wrote to defendant requesting him to send a transcript of the records and a copy of the pleadings, orders, and decrees or any and all other papers in the case of Max Rosenthal *versus* Kersey Coates, assignee, The Mastin Bank, and The Metropolitan National Bank, in the United States circuit court for the southern district of New York, the same to be sent so as to arrive in Kansas City before the — day of ——, 188–, being the last day for answering in above-entitled cause; that up to the last day for answering said Scott & Taylor did not receive said papers and did file an answer in this cause, admitting that said case had been tried in New York and judgment given against the claim of this defendant therein made; that said answer was filed under a mistake on the part of said Scott & Taylor in their believing that said cause had gone to final judgment in said United States circuit court for the southern district of New York; that said mistake was caused by no fault of defendant's attorneys and, affiant believes, by no fault of defendant; that defendant sent these papers to his agent, Joseph Lorie, to deliver to his (defendant's) attorneys; that said agent delivered them to his own attorneys, who held them in their possession until after the trial of this cause; that Scott & Taylor, finding that said papers were in the hands of other attorneys, were led to believe that defendant had taken his case out of their hands, and were informed by said agent's attorneys that they would file an answer in this cause.

That said Scott & Taylor paid no further attention to this case, but appeared on the day of the trial for several other defendants, when they discovered that no answer had been filed and were informed by said agent's attorneys that they did not represent said defendant; that said Scott & Taylor stated on the trial of said cause that they were not prepared to represent said Rosenthal for reasons above set forth; that since said trial affiant has
35 succeeded in getting said papers from defendant's agent's attorneys, and that said papers show that this cause was tried on the 26th day of November, 1879; that on said date his honor Judge Blatchford sustained the demurrer of defendant to plaintiff's petition, giving defendant leave to move to set the same aside upon payment of costs; that costs were paid and motion to set aside filed in due time; that John Henry Hull, who represented defendant in New York, has written affiant since decree rendered in circuit court, Kansas City, that there never was any final decision in the New York court, and that no further proceedings than above indicated have ever been entered on the judgment-roll; that affiant wrote for a separate certificate of clerk of the United States circuit court that no further proceedings had been had in that court further than above indicated, and that the costs ordered to be paid upon sustaining demurrer had been paid; that he has just received a telegram that same were duly mailed, and as they have not yet been received, and this will probably be the last day that court will sit this term, they cannot be attached to this affidavit; that affiant has made every effort within his power to procure papers, but that from trial of cause to this date they could not possibly be had here, and that if said papers were here he believes a new trial would be granted in this case.

WILLIAM J. SCOTT.

Subscribed and sworn to before me February 21st, 1882.

WALLACE LAWS, *Clerk*,
By J. S. CHASE, *D. C.*

Max Rosenthal in his affidavit stated that he was one of the defendants in this case, and that he lives in the city of New York; that some time previous to the beginning of this term of the court his attorneys, Scott & Taylor, wrote to him for the particulars of the proceedings of the court in New York, where his claim
36 was before considered; that he sent the papers containing the information asked for to his agent at Kansas City, with instructions to deliver them to his said attorneys, but that, owing to a misunderstanding, the said papers were delivered by his agent to other attorneys; that of this fact he had no knowledge until after the trial herein, and that, by reason of this mistake, he believed his attorneys to have been misled as to the facts of the case, and to have answered contrary to the facts from the reason that he was informed by his attorney in New York, who attended the case in the trial there, wherein this question is claimed to have been finally settled, that there was never a final judgment in the case in New York, but

that his said attorney had voluntarily dismissed the suit there, showing that his said answer in said cause was filed by accident and mistake of facts, and that a final decision had not been had in chancery in the circuit court of the United States for the district of New York, as shown in the petition and answer, or, as alleged, in the decree to be shown in the petition and answer; which motion was by the court overruled; whereupon defendant Rosenthal filed his cross-appeal in the case of Coates *v.* Doran, and the entire record went to the supreme court of Missouri, where the matter of the appeal of Coates, assignee, and the cross-appeal of Rosenthal was heard and argued and the following judgment was rendered therein by the supreme court:

Entry showing appeal of Coates, Exhibit A, following:

37 EXHIBIT A.

THURSDAY, 21*st Feb'y*, 1882.

KERSEY COATES, Assg. of the Mastin Bank, Pl'ff,
vs.
KATE DORAN *et al.*, Def'ts.

This day plaintiff files motion for a new trial, and on consideration the court overrules said motion; to which plaintiff excepts; thereupon said plaintiff tenders his bill of exceptions, which is by the court allowed and signed and filed and made a part of the record. Thereupon said plaintiff files affidavit for appeal from the judgment herein to the supreme court of the State, and the court allows the plaintiff to make his appeal to the supreme court, and plaintiff makes his appeal to the supreme court.

38 October Term, 1884.

KERSEY COATES, Assignee of the Mastin Bank, Appellant,
vs.
KATE DORAN *et al.*, Respondents.

The Mastin bank, doing business in Kansas City, Mo., kept an account with the Metropolitan National bank in New York. The Mastin bank failed and made an assignment to the plaintiff on Aug. 3, 1878, and at the time of the assignment there was in the Metropolitan National bank to the credit of the Mastin bank $62,386.74; at the same time there were outstanding checks or drafts drawn against this fund amounting to $81,884.60. The said sum of $62,386.74 was afterwards paid over to the assignee by the Metropolitan National bank. The assignee, in due course of administration, proceeded to allow claims as provided by law, and nearly all of said checks or drafts were presented by the holders and allowed, but some were not presented at all and, of course, were not allowed. On such as were allowed dividends were paid the same as to other creditors. Subsequently suits were commenced by certain ones of those draft-hold-

ers against the assignee, both in the State and Federal courts, wherein it was held that the parties were entitled to be paid in full out of this money. The several sums thus recovered amounted to $8,656, in favor of the several parties, as set out in the petition. This left in the hands of the assignee $53,730.74, with drafts equally entitled to be paid therefrom still outstanding, amounting to $73,228.60. Under these circumstances the assignee filed this suit, making all of said draft-holders parties defendant. In this he asked the court to determine whether the holders of these drafts had any preferred claim on this fund received by him from the Metropolitan National bank, and, if so, that he be instructed as to the order in
39 which they should be paid, whether *pro rata*, in the order of date, the number of the drafts, in the order of their presentation for payment, or otherwise, and he further asked that their several rights be determined in this case, and that they be enjoined from further prosecuting any claim to said fund. The several claimants appeared to this action. One or more was rejected, but the court by its decree ordered the money to be distributed *pro rata* among the balance, and from this decree this appeal was taken.

This case is not distinguishable in principle from that of Dickenson *vs.* Coates, 79 Mo., 250, in which it was held that a check drawn for a part only of the drawer's deposit did not operate either at law or in equity as an assignment *pro tanto* of the deposit or confer any lien upon it. Following that case, the judgment in this must be reversed, which is hereby done, and the cause remanded. All concur.

E. H. NORTON.

STATE OF MISSOURI, *sct:*

I, Henry W. Ewing, clerk of the supreme court of Missouri, do hereby certify that the foregoing is a true copy of the opinion of said court delivered in the foregoing-entitled cause on the 22 day of December, 1884, as fully as the same appears on file in my office.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said supreme court. Done at office, in the city of Jefferson, State aforesaid, this 24th day of December, 1884.

Fee, $1.00.

H. W. EWING, *Clerk*,
By E. B. EWING, *D. C.*

40 *Copy Mandate.*

Supreme Court of Missouri, October Term, 1884.

KERSEY COATES, as Assignee of the Mastin Bank, Appellant,
vs.
KATE DORAN & Other Respondents and MAX ROSENTHAL, Appellant.

Appeal from Jackson county circuit court.

Now, at this day, comes again the parties aforesaid, by their respective attorneys, & the court, being now sufficiently advised of and

concerning the premises, do consider and adjudge that the judgment aforesaid, in form aforesaid by the said Jackson county circuit court rendered, be reversed, annulled, & for naught held & esteemed, & that the said appellants be restored to all things which they have lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to said Jackson county circuit court for further proceedings to be had therein in conformity with the opinion of this court herein delivered, & that the said appellants recover against the said respondents their costs & charges herein expended and have thereof execution. (Opinion filed.)

STATE OF MISSOURI, *sct:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true, and complete transcript of the judgment of said supreme court entered of record at the October term thereof, 1884, and on the 22nd day of December, 1884, in the above-entitled cause.

[L. S.] Given under my hand and the seal of said court, at the city of Jefferson, this 29th day of January, 1885.

41 HENRY W. EWING, *Clerk*,
By E. B. EWING, *D. C.*

T. A. FRANK JONES,
Att'y for K. Coates, Assignee in Case Coates, Assignee, vs. Kate Doran, Max Rosenthal, et al.
WILLIAM J. SCOTT,
Att'y for Rosenthal.

And afterwards, at the October term of said court and on the 18th day of October, A. D. 1886, the following entry appears of record, to wit:

KERSEY COATES, Assignee,
against
KATE DORAN *et al.*

This day a stipulation of parties is filed as to the record in this cause.

Said stipulation is in words and figures as follows, to wit:

In the Supreme Court of the State of Missouri, at Jefferson City, October Term, 1884.

KERSEY COATES, Assg., &c., App.,
vs.
KATE DORAN *et al.*, Resp. } 1830.

It is hereby stipulated in the above-entitled cause that the judgments from which this appeal was taken was rendered February 2d, 1882, and that this appeal was taken February 21st, 1882; that appellant Coates paid the checks of the Mastin bank on which judg-

ment was rendered in full and took from respondents their
42 receipts therefor and demanded and received a surrender of said checks, and said Coates filed no supersedeas bond herein. It is further stipulated that said Coates, assignee, has sold out his entire interest in the assets of the said Mastin bank to J. V. C. Karnes, who is now the owner of the same.

KARNES & ESS,
Att'ys for Appellant.

STATE OF MISSOURI, *sct:*

I, Henry W. Ewing, clerk of the supreme court of Missouri, do hereby certify that the foregoing is a true copy of the stipulation in the foregoing-entitled cause as fully as the same appears on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court. Done at office, in the
[SEAL.] city of Jefferson, State aforesaid, this 9th day of September, 1886.

HENRY W. EWING, *Clerk.*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

KERSEY COATES, Assg.,
vs.
KATE DORAN *et al.*

It is hereby stipulated and agreed that copies of the opinion, papers, or records in the supreme court in this case may be considered a portion of the record herein when the same are duly certified.

WILLIAM J. SCOTT,
For Def't Rosenthal.
T. A. FRANK JONES,
Att'y for Pl'ff Coates.

43 On the 22nd day of October, A. D. 1886, the following entry appears of record, to wit:

KERSEY COATES, Assg.,
against
KATE DORAN *et al.*

This day comes complainant, by his solicitor, Frank Jones, and files motion to remand this cause; also come defendants, by their solicitor, Wm. J. Scott, and the said motion to remand coming on for hearing is argued by counsel and submitted to the court *et curia advisare vult.*

Said motion to remand is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

KERSEY COATES, Assignee of the Mastin Bank, Complainant,
vs.
KATE DORAN, MAX ROSENTHAL, *et al.*, Defendants.

The complainant hereby moves the court to remand the above cause to the circuit court of Jackson county, Missouri, and for cause of such motion says:

1. That the petition for removal was not filed in the circuit court of Jackson county, Missouri, by defendant Rosenthal at the time of entering his appearance in said court nor before or at the time at which said cause could first be tried and before the trial thereof nor before the final hearing and trial of said cause.

2. Because the said suit is not wholly between a citizen of the State in which it is brought and citizens of other States.

44

KERSEY COATES,
Assignee of the Mastin Bank,
By T. A. FRANK JONES,
His Solicitor.

And on the 25th day of October, 1886, the following entry appears of record, to wit:

KERSEY COATES, Assg.,
against
KATE DORAN *et al.*

This day come the parties by their attorneys, the complainant by Frank Jones and the defendant by Wm. J. Scott, and, the motion to remand this cause to the State court having been heretofore submitted to the court and taken under advisement, now the court, being fully advised concerning the premises, doth order that the same be granted and that this cause be remanded with costs to the court from which it came; to which ruling of the court defendant Rosenthal excepts.

And afterwards, in vacation of said court and on the 13th day of January, 1887, the following entry appears of record:

KERSEY COATES, Assg.,
against
KATE DORAN *et al.*

The following order was this day filed and ordered to be recorded, to wit:

"KERSEY COATES, Assg.,
vs.
KATE DORAN, MAX ROSENTHAL, *et al.*

Now comes defendant Max Rosenthal, by his attorney, and prays the court to grant him an appeal herein to the Supreme

Court of the United States; which said appeal is, upon due consideration, granted by the court upon defendants filing a
45 good and sufficient bond for costs herein in the penal sum of five hundred dollars, which said bond defendant now files, and the same is by the court approved.

Appeal granted.

A. KREKEL, *Judge.*"

Said bond is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City, October Term, 1886.

KERSEY COATES, Assignee, Pl'ff,
versus
MAX ROSENTHAL, Def't.

We, the undersigned, Max Rosenthal as defendant and Joseph Lorie as surety, acknowledge ourselves indebted to Kersey Coates, assignee, in the sum of five hundred dollars, to be void upon this condition: Whereas Max Rosenthal has appealed from the decision of the United States circuit court for the western division of the western district of Missouri in the above-entitled cause:

Now, if on such appeal the judgment of the said court be affirmed, or if his appeal be dismissed, or a judgment be given against him, the defendant shall pay the costs of this appeal, then this recognizance shall be void; otherwise it shall remain in full force.

Witness our hands and seals the 13th day of January, 1887.

MAX ROSENTHAL, [SEAL.]
By W. J. SCOTT, *His Attorney.*
JOSEPH LORIE. [SEAL.]

Approved Jan. 13th, 1887.
A. KREKEL, *Judge.*

46 On the 14th day of January, 1887, the following entry appears of record, to wit:

KERSEY COATES, Assg.,
against
KATE DORAN *et al.*

This day a stipulation of parties is filed waiving the issue and service of a citation and entering the appearance of complainant to the appeal of defendant Rosenthal.

Said stipulation is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, to October Term, 1886.

KERSEY COATES, Assignee,
versus
KATE DORAN, MAX ROSENTHAL, *et al.*

It is hereby stipulated and agreed that the issue and service of citation and notice of appeal herein to the Supreme Court of the United States is hereby waived and appearance of appellee is hereby entered.

T. A. FRANK JONES,
Att'y for Coates, Assignee.

47 UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *sct:*

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for said division and district, do hereby certify that the foregoing is a true and complete transcript of the pleadings, proceedings, and final decree in the cause wherein Kersey Coates, assignee, is complainant and Kate Doran, Max Rosenthal, *et al.* are defendants, as fully as the same remains on file and of record in my office.

Witness my hand as clerk and the seal of said court.

Done at office, in the city of Kansas, this 14th day of February, A. D. 1887.

{ Seal of the United States Circuit Court, Western Division for the Western District of Missouri. }

H. C. GEISBERG, *Clerk*,
By WARREN WATSON, *D. C.*

Endorsed on cover: Case No. 12,474. W. Missouri C. C. U. S. No. 3. Max Rosenthal, appellant, *vs.* Kersey Coates, as assignee of the Mastin bank. Filed February 28, 1887.

3

148 U.S. 142

Office Supreme Court U. S.
FILED,
SEP 27 1892
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

NUMBER 3.

To OCTOBER TERM, 1892.

MAX ROSENTHAL, *Appellant,*

vs.

KERSEY COATES, ASSIGNEE OF THE MASTIN BANK, *Respondent.*

RECORD.

BRIEF OF PLAINTIFF IN ERROR.

O. H. DEAN
AND
WM. J. SCOTT,
Attorneys for Plaintiff in Error.

THE S. F. W. PTG. CO., K. C., MO.

IN THE

SUPREME COURT OF THE UNITED STATES.

MAX ROSENTHAL, *Appellant*,
vs.
KERSEY COATES, ASSIGNEE OF THE MASTIN BANK, *Respondent*.

AGREED STATEMENT OF THE FACTS APPEARING IN THE RECORD.

This is an equity suit which was originally brought by the respondent as plaintiff in the circuit court of Jackson county, Missouri, at the April term, 1881. The allegations of the petition were substantially that plaintiff, as the assignee of the Mastin Bank of Kansas City, Missouri, had in possession the sum of $62,386.74 which was on deposit with the Metropolitan National Bank of New York, to the credit of the Mastin Bank, at the time of the assignment of the latter bank to plaintiff; that a large number of drafts had been drawn by

the Mastin Bank, before its assignment, upon the Metropolitan National Bank, which were presented for payment after the assignment of the Mastin Bank; that the Metropolitan National Bank refused to pay these drafts, and paid over to plaintiff, as aforesaid, the deposit of the Mastin Bank; that a number of the holders of these drafts had brought suits in different courts upon these drafts; that among others, M. H. Dickinson had brought suit upon one of these drafts in the circuit court of Jackson county, Missouri, and obtained judgment for the full amount thereof against the plaintiff (Coates.) And that plaintiff had appealed from said judgment to the Supreme Court of Missouri, and that his appeal was then pending in that court; and that, for the purpose of avoiding a multiplicity of suits and saving a large amount of costs, plaintiff had brought this suit, and prayed the court to determine and decree whether these said drafts should be paid in full by plaintiff, (it being conceded that the aggregate amount of such drafts was less than the sum of money so on deposit with the Metropolitan National Bank, and by it paid over to plaintiff,) or whether the holder of such drafts should be considered and treated by the plaintiff as general creditors of the Mastin Bank. All the holders of these drafts, a part of whom were residents, and a part non-residents of the State of Missouri,

were made defendants in this suit, and legal service was had upon all of them. Defendant Max Rosenthal answered the petition, and plaintiff filed a reply to his answer. The cause was submitted to the circuit court of Jackson county, Missouri, at its October term, 1881, and the decree of the court was that the amount of their drafts should be paid in full to all of the defendants except Max Rosenthal; as to him, the court found that the controversy between him and the plaintiff had already been adjudicated, and decreed that he should take nothing in this suit.

From this decree, (it being one single decree as to all the defendants,) both the defendant, Max Rosenthal, and the plaintiff appealed to the supreme court of the State of Missouri; the plaintiff, however, filed no super-sedeas bond, and, while the appeal was pending, paid in full, in accordance with the decree of the lower court, the drafts of the defendants in whose favor the decree was given, and took their receipts therefor, and demanded and received the surrender of the said drafts.

The Supreme Court of Missouri, at its October term, 1884, reversed the judgment of the lower court and remanded the cause for further proceeding, in conformity with the opinion of the court.

The opinion (*Coates vs. Doran*, 83 Mo. 337) states that the decision in the case of *Dickinson vs.*

annulled and for naught held and esteemed, and that the said appellants be restored to all things which they have lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to said Jackson county circuit court for further proceedings to be had therein in conformity with the opinion of the court herein delivered, and that the said appellants recover against the said respondents their costs and charges herein expended, and have therefor execution. (Opinion filed.)

O. H. DEAN,
WILLIAM J. SCOTT,
Attorneys for Appellant.
T. A. FRANK JONES,
Attorney for Respondents.

In Supreme Court of the United States.

The foregoing statement and stipulation as to what the record shows we think fully states the case.

ASSIGNMENT OF ERRORS.

The appellant assigns as error the ruling of the Circuit Court in sustaining the motion to remand to the State court. Filed by appellee.

ARGUMENT AND BRIEF.

As this court has frequently decided, the third clause of Sec. 639, R. S. 1879, generally known as the local prejudice act, is not repealed by the act of 1875.

Hess vs. Reynolds, 113 U. S. 73.

There seems to be only two objections which could be raised to the right of removal.

First. Was the petition filed "before the trial or final hearing of the suit?"

Second. Does the record show citizenship conferring jurisdiction on the federal court?

In reply to the first question, we think that "trial or final hearing" was intended to cover all time before the trial or final hearing, the addition of the words "or final hearing" indicate that Congress intended a liberal construction of what was intended by trial, and we do not think that a mistrial, where the case is sent back for a new trial, or a ruling, as in this case, on the technical objection of *res adjudicata*, or any other legal objection, when reversed by the supreme court, is such trial or final hearing as is contemplated by the statute. A reversal or remanding of the case under our Missouri practice authorizes a new trial. As far as Rosen-

thal was concerned, there were many points to be adjudicated on a new trial.

First. If case was *res adjudicata* as to him.

Second. If he was entitled to dividends already paid or only to those declared in future. If an attachment placed by him on these funds in the hands of the Metropolitan Bank was not a prior lien, etc. The courts have held that the prejudice may arise at any time before trial, though not existing when suit brought; so it may arise during the time the cause is pending in the Supreme Court on appeal, and may not have existed at the time the matter was first before the lower court, or it may not have existed at the date of the failure of a concern with liabilities of nearly $2,000,000, as the creditor may expect to get a large proportion of their debts, and yet arise afterward when it is found the assignee will only pay 17½ per cent of it to the general creditors. In such a case, where the indebtedness is mostly local, and the draft-holders are mostly foreign, there is reasonable grounds for strong prejudice against the foreign draft-holder receiving payment of his draft in full.

Insurance Company vs. Dunn, 19 Wallace, 214.
Vannear vs. Bryant, 21 Wallace, 414.
Jiffkins vs. Switzer, 102 U. S. 177.
Hewitt vs. Phelphs, 105 U. S. 395.
Dart vs. Walker, 43 How. Pc. 29.
Dart vs. McKinney, 9 Blatchford, 359.
Akerly vs. Vilas, 2 Bissell, 110.

Secondly, the record shows Coates, assignee, a citizen of Missouri, sues Rosenthal, a citizen of New York, and others, some of whom are and others are not citizens of Missouri; all the parties except Rosenthal have been voluntarily paid, and the full amount of their demands settled, and their drafts delivered up; therefore there are only two persons now proper parties to this suit, viz.: Rosenthal and Coates.

There is a separable controversy between Coates and Rosenthal; therefore this case is removable. See language of Mr. Justice Harlan, in case of *Barney vs. Latham*, 103 U. S., page 205, in referring to the case of *Sewing Machine Company*, 18 Wall. 553, says: "The court there evidently had in mind the case where the presence in the suit of all the parties, on the side seeking the removal, was essential that complete justice might be done, and not a suit in which there was a separable controversy, removable under the act of 1866."

Akerly vs. Vilas, supra.
Barney vs. Latham, 103 U. S. 205.
Cohens vs. Virginia, 6 Wheat. 264.

O. H. DEAN,
WILLIAM J. SCOTT,
Attorneys for Appellant.

148 US 142

Office Supreme Court U. S.
FILED.
DEC 19 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

MAX ROSENTHAL,

Appellant.

against

KERSEY COATES, Assignee,

Appellee.

MOTION, NOTICE, AFFIDAVIT, AND BRIEF ON MOTION TO RE-INSTATE CAUSE ON DOCKET.

GEORGE HOADLY,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1892.

MAX ROSENTHAL,
Appellant,

versus

KERSEY COATES, Assignee,
Appellee.

No. 3.

MOTION, NOTICE, AFFIDAVIT, AND BRIEF ON MOTION TO RE-INSTATE CAUSE UPON DOCKET.

Motion.

Now comes Max Rosenthal, appellant, by George Hoadly, his attorney, and moves the Court to set aside the order made herein on Monday, October 17th, 1892, dismissing this cause under the Tenth Rule, "on the ground that the record was not printed:"

For the following reasons, to wit:

I.—That this is an appeal under Section 5 of the Act of March 3d, 1875, and is governed by Rule 32 of this Court.

II.—That Section 4 of Rule 32 reads as follows:

"As soon as such a case is docketed and advanced, the record shall be printed, unless the parties stipulate to the contrary, and file their stipulation with the Clerk."

III.—That on November 26th, 1889, appellant filed a stipulation signed by counsel for appellee and appellant, "agreeing that the record need not be printed," and in the agreed statement of what the record contains, on file in this Court and printed with appellant's brief, it is therein again stipulated by both parties that "the record need not be printed."

IV.—That the agreed statement of what the record contains, embodied in appellant's brief contains everything that could in any wise bear on the question now before this Court.

Yet, if your Honors construe Section 4 of Rule 32 as requiring the record to be printed, or if your your Honors desire it printed, appellant will gladly have it done.

WHEREFORE, appellant prays your Honors to set aside your said order and reinstate this cause upon the docket, subject to such conditions as to printing the record as your Honors may consider proper:

WHEREFORE, appellant prays your Honors to sustain this his said motion.

MAX ROSENTHAL,
by GEO. HOADLY,
His Attorney.

December 19, 1892.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1892.

MAX ROSENTHAL,
Appellant,

vs.

KERSEY COATES, Assignee of the MASTIN BANK,
Respondent.

No. 3.

Notice of Motion.

To T. A. Frank Jones, attorney of record for said respondent, and William B. Teasdale, assignee of the Mastin Bank, successor to said Kersey Coates, assignee respondent, deceased:

You, and each of you, are hereby notified that Max Rosenthal, appellant in the above entitled cause, will on Monday December 19th A. D., 1892, at 12 o'clock noon, or as soon thereafter as counsel can be heard, move the Court to set aside its order made at the October term, 1892, striking this cause from the docket and dismissing the appeal on the ground of failure to print the record herein; and will also move the Court to restore the cause to the record and assign it for hearing.

MAX ROSENTHAL,
Appellant,
by WILLIAM J. SCOTT,
his Attorney.

Service of a copy of above notice made by me this 5th day of December, 1892, on above mentioned

T. A. Frank Jones and William B. Teasdale, assignee as aforesaid.

WILLIAM J. SCOTT.

Subscribed and sworn to before me this 5th day of December, 1892.

{ Seal of Court affixed. }

ADELAIDE UTTER,
Clerk U. S. Cir. Ct.,
W. D. W. D. Mo.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1892.

MAX ROSENTHAL,
Appellant,

vs.

KERSEY COATES, Assignee of the MASTIN BANK,
Respondent.

No. 3.

Affidavit.

WILLIAM J. SCOTT, being duly sworn, upon his oath says, that he is personally acquainted with the T. A. F. Jones and William B. Teasdale, assignee of the Mastin Bank, on whom copies of the notices hereto attached were duly served; and that said T. A. F. Jones is a member of the bar of this Court; that he signed the agreed statement of facts on file in this Court as attorney for Kersey Coates, assigeee and respondent. That said William B. Teasdale is the successor as assignee of the Mastin

Bank, to Kersey Coates, assignee of the Mastin Bank respondent, deceased.

WILLIAM J. SCOTT.

Subscribed and sworn to before me, this 4th day of December, 1892.

{ Seal of Court affixed. }

ADELAIDE UTTER,
Clerk U. S. Cir. Ct.,
W. D. W. D. Mo.

Brief for Appellant upon Motion to Reinstate Case.

I am persuaded that this cause was stricken from the docket under a misapprehension, by the Court, of its real condition.

At the time the cause was appealed and docketed that part of Rule 32 relating to the hearing of removal cases, of which this is one, was in the following form:

"3. *Hearing of cause.*—All such cases will be advanced on motion and heard under the rules prescribed by Rule 6 in regard to motions to dismiss writ of errors and appeals.

"4. *Printing Record.*—As soon as such a case is docketed and advanced the record shall be printed, unless the parties stipulate to the contrary and file their stipulation with the Clerk."

On Nov. 26, 1889, the parties, by their attorneys, signed and filed with the Clerk, a stipulation—

"that the record need not be printed."

The parties again stipulated to the same effect in their—

"agreed statement of the facts appearing in the record,"

contained in the printed pamphlet on file entitled

"Record. Brief of Plaintiff in Error,"

and filed their stipulation with the Clerk (see printed agreement, page 5). This is signed by counsel

upon both sides, and contains the following language (italics mine) :

"It is conceded by stipulation that at the time of the institution of this suit Kersey Coates was, and now is, a citizen of the State of Missouri, and that Max Rosenthal was then, and now is, a citizen of the State of New York, and that this case is properly before this Court, and Coates, as assignee, hereby enters appearance, *and the parties hereto hereby waive the printing of the record.*"

It is quite true that no motion was made to advance the cause, but it is respectfully submitted that the right of the parties to stipulate that the record shall not be printed, and to file their stipulation with the Clerk, does not depend upon the order to advance the cause. The right to advance the cause given by the *third* paragraph of the thirty-second rule was absolute and not discretionary, and the time at which the record was required to be printed was specified to be—

"as soon as such a case is docketed,"

but with the exception—

"unless the parties stipulate to the contrary and file their stipulation with the Clerk."

It is respectfully submitted :

First.—That this rule is as applicable when the cause is reached on the regular call of the calendar as when it has been advanced. There is no special merit in an advanced cause as compared with one reached on the call. The object of the rule was to give the parties the right to advance the cause, and have it heard at once, if they should so desire, and also to have it heard upon the stipulation, and not upon the printed record. The question in such

cases is one of removal, and not of merits, and, therefore, it was not deemed necessary to require the printing of the whole record. This applies as truly to such a cause when reached on the calendar as to one advanced under the rule.

Secondly.—If I should prove to be wrong in this, and the motion to advance be held to be a condition precedent to the parties' right to forego printing the whole record, and to the submission of the cause upon stipulation, as was attempted in this case, nevertheless, it is within the discretion of the Court, upon such conditions as it may prescribe, to give to the party who has been misled by the argument hereinbefore adduced, a *locus penitentiæ*, and allow the re-instatement of the cause, where the other party has not suffered from the omission to print the record, requiring the former to submit to other conditions if necessary to preserve the just rights of the latter.

Thirdly.—The condition of things in this case establishes the good faith of my client, his desire to do his duty, and the severity of the application of the *tenth* rule to him.

At the time this cause was appealed to this Court, the appellee Kersey Coates was living, and T. A. Frank Jones was his attorney. In accordance with Rule 32, already cited, and in anticipation of a motion to advance, Dean & Scott, attorneys for appellant, and Jones, attorney for respondent, entered into the stipulation not to print the record, and also agreed upon and printed the "agreed statement of the facts appearing in the record," which is on file. It is unfortunately entitled on the cover, "Record; Brief of Plaintiff in Error," but the fact is that, while it contains an argument and brief signed by my learned associates at Kansas City, Messrs. Dean & Scott, it also contains, as already shown, the stipu-

lation which the record contemplates, and permits to take the place of the printed record. After this Coates died, since which time no representative of respondent has appeared. The death of Coates was suggested, and notice by publication ordered by this Court, on October 21, 1890. Proof of publication was filed October 12, 1891. No successor to Coates has appeared. Notice of the present motion has been given to Jones, who signed the stipulation, and to William B. Teasdale, who is proved by affidavit herewith submitted, to have become the successor of Coates, as assignee of the Mastin Bank, but neither of them has as yet appeared or taken any notice of the motion or the cause.

Fourthly.—I offer in behalf of my client to submit to any condition the Court may impose, whether it be printing of the record, payment of costs or otherwise—one or all ;—but I respectfully submit that this cause should have been heard, and not stricken from the calendar, when it was called. I submit that the only possible objection to such hearing was, that Messrs. Dean & Scott—who signed their names to the argument and brief—were not and are not counsellors of this Court. I, however, occupy that position. Mr. Rosenthal is my client, and my signature may be treated as attached to every paper which Messrs. Dean & Scott have filed, as their associate or in their stead as the case may require. Those gentlemen are men of the highest respectability in the profession ; they are entitled to become members of this Court on motion ; but they live at a distance from Washington City, and this is the only reason why they have not applied for admission as counsellors of this Court. I offer to sign their argument and brief, and to enlarge upon it if it become necessary, although, I think, nothing can well be added to what they have said, except, perhaps, to call attention to

the fact, shown by the record, that this case was removed from the State to the Federal Court before the passage of the Act of March 3, 1887, which cut off our clients' right of appeal from the order to remand. The date when petition, affidavit and bond for removal were filed in the State Court, are shown by the record to have been February 10, 1885, the transcript was filed in the Circuit Court May 18, 1885, the order of the Circuit Court remanding the case to the State Court was entered October 25, 1886, and the transcript of record filed in this Court February 28, 1887.

December 19th, 1892.

Respectfully submitted,

GEORGE HOADLY,
Of Counsel for Max Rosenthal.

3

148 U.S. 142

Office Supreme Court U. S.
FILED.
JAN 28 1893
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

MAX ROSENTHAL, *Appellant,*

vs.

KERSEY COATES, Assignee of the MASTIN BANK, *Respondent.*

Brief on Behalf of W. B. Teasdale,

ASSIGNEE OF THE MASTIN BANK.

T. A. FRANK JONES,
Solicitor of W. B. Teasdale, Assignee.

KANSAS CITY, MO.:
The S. F. Woody Printing Co., 615 Delaware St.
1892.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

MAX ROSENTHAL,
Appellant,

vs.

KERSEY COATES, Assignee of the MASTIN BANK,
Respondent.

BRIEF ON BEHALF OF W. B. TEASDALE,

ASSIGNEE OF THE MASTIN BANK.

I.

At the time the appellant filed his petition for removal, this cause, as the record shows, had been tried in the circuit court of Jackson county, Missouri, appealed to the Supreme Court of Missouri and by it remanded to the Jackson county circuit court. Therefore it was not re-

movable under the Act of March 3, 1875, which requires that the petition for removal be filed before or at the term said cause could first be tried and before the trial thereof. It was not removable under the first subdivision of Section 639 of the Revised Statutes of the United States, which requires that the petition for removal be filed at the time the petitioner enters his appearance in the state court. It was not removable under the second subdivision of Section 639, which was repealed by the Act of March 3, 1875.

Hyde vs. Ruble, 104 U. S. p. 407.
King vs. Cornell, 106 U. S. p. 395.
Ayers vs. Watson, 113 U. S. p. 594.

Therefore the appellant must rely entirely upon the provisions of the third subdivision of Section 639 to support his removal.

II.

The appellant is one of a large number of defendants, and the third subdivision of Section 639 gives no authority for the removal of a cause as between the plaintiff and a single defendant, leaving the controversy between the plaintiff and the other defendants in the state court.

"The provision as to the removal of a separable controversy under the second subdivision of Section 639 has no application to removals under

the third subdivision; and the similar provision in the Act of 1875 applies only to removals under that Act."

Jefferson vs. Driver, 117 U. S. p. 272.

Nor could the appellant remove the entire cause as to all the defendants under the third subdivision of Section 639, for the reason that, as the record shows, a part of the defendants are citizens of the same state as the plaintiff, the State of Missouri.

"So far as the removals on the ground of local prejudice are concerned, it is only necessary to say that such removals can only be had where all the parties to the suit on one side are citizens of different States from those on the other."

Jefferson vs. Driver, 117 U. S. p. 272.
Case of the Sewing Machine Companies, 18 Wall. p. 553.
Vannevar vs. Bryant, 21 Wall, p. 41.
Myers vs. Swan, 107 U. S. p. 546.

III.

The application for removal was too late. Before it was made there had been a final hearing of the suit in the state courts in the sense contemplated by the third subdivision of Section 639.

Boggs vs. Millard, 3 Bissell, p. 256.
Jifkins vs. Sweetser, 102 U. S. p. 177.

This is apparent from a consideration of the pleadings in the case and the opinion of the Supreme Court of Missouri. The respondent, Coates, as assignee of the Mastin Bank, brought an equity suit in the circuit court of Jackson county, Missouri, against all the holders of a certain class of drafts which had been issued by the Mastin Bank prior to its assignment. The sole object of the suit was to determine whether these draft holders had a lien upon the deposit of the Mastin Bank in the bank upon which the drafts were drawn, which was sufficient in amount to pay the drafts in full, or whether they were only general creditors of the Mastin Bank. Among the draft holders who were made defendants in this proceeding was one Dickinson, who had already brought suit upon his draft in the circuit court of Jackson county, Missouri, and had recovered judgment that his draft be paid in full by the assignee. From this judgment the assignee had taken an appeal to the Supreme Court of Missouri, which was then pending. On the hearing of the equity suit of the assignee against all the draft holders, the circuit court of Jackson county, Missouri, again gave judgment that the drafts be paid in full. From this decree, however, the draft of Rosenthal, the appellant herein, was excepted on the ground that his claim against

the assignee had already been adjudged against him by another court. From the judgment in this case assignee and Rosenthal prosecuted seperate appeals to the Supreme Court of Missouri. Before their appeals were reached, however, the appeal of the assignee from the judgment recovered by Dickinson against him had been heard and determined by the Supreme Court of Missouri. In this case (*Dickinson vs. Coates*, 79 Mo. p. 250) the law in respect to drafts of this kind was settled in this State, and it was held that such a draft was not an assignment *pro tanto* of the fund against which it was drawn; the judgment of the lower court was reversed and *the plaintiff's bill was dismissed*. This opinion decided every issue presented in the suit between the assignee and the rest of these draft holders, and accordingly, when that case was reached in turn, the Supreme Court of Missouri, by way of opinion, merely referred to its recent decision in the Dickinson case, reversed the judgment of the circuit court and remanded the cause for further proceedings in conformity with the opinion.

Coates vs. Doran et al., 83 Mo. p. 337.

The effect of this decision was to put all the other defendants upon the same footing with Rosenthal: that is, it was decided that none of them should take anything in that proceeding.

As a consequence of that decision Rosenthal's appeal from the judgment of the circuit court became wholly immaterial, and accordingly is not referred to in the opinion of the court.

The mandate of the Supreme Court of Missouri to the circuit court of Jackson county was in effect a direction to enter up a decree in favor of the plaintiff. No other proceedings were possible in conformity with the opinion, and the Supreme Court might well have given final judgment as it did in the analogous case of *Dickinson vs. Coates*. The fact that the case was formally remanded affords the only pretext for appellant Rosenthal's petition for removal. For several years he had "experimented on his case" in the State courts by appearing, answering, arguing and appealing, and it is only after the question at issue between him and the respondent was fully determined by the State Court of last resort that he applied for a removal of the cause to the federal court.

Respectfully submitted.

T. A. FRANK JONES,

Solicitor for W. B. Teasdale, Assignee of the Mastin Bank.

148 US 142

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

MAX ROSENTHAL,
Appellant,

vs.

KERSEY COATES, as Assignee of the Mastin Bank,
Appellee.

No. 3.

BRIEF FOR APPELLANT.

Statement of Facts.

This is a removal case, but it is perhaps necessary and certainly will serve a useful purpose to state the facts fully.

The action was brought on June 23d, 1881, in the Circuit Court of Jackson County, Missouri, by Kersey Coates, as assignee of the Mastin Bank, plaintiff, against Kate Doran, Max Rosenthal and others.

The petition, (Record fol. 2,) avers that the Mastin Bank was a corporation of Missouri, carrying on a banking business at Kansas City, in the course of which it deposited moneys in the Metropolitan

Bank of New York City, drawing checks or drafts against such deposits;—that on Saturday, August 3, 1878, it executed a deed of general assignment to Kersey Coates, for the benefit of its creditors; that Coates accepted and administered the trust; that at the time of such assignment, a large number of drafts were outstanding, drawn by the Mastin on the Metropolitan Bank; that immediately after accepting the trust, Coates notified the Metropolitan Bank thereof, by telegram, which was received by said bank before business hours on Monday, August 5, 1878; that the latter bank paid none of said checks or drafts after such notice was received, but that a number of such drafts or checks, previously drawn, were on and after August 5, 1878, presented for payment to the Metropolitan Bank, payment refused and due notice of protest and dishonor given to the Mastin Bank; that before such notice of such assignment, the Metropolitan Bank had received, and it afterwards paid to said Coates as assignee, in full of what it owed said Mastin Bank at the time of receiving such notice, $62,386.74. A list of the drafts upon the Metropolitan Bank outstanding at the time of such assignment is given in the petition; and it is averred, (fol. 4) that some but not all of the same were presented to the assignee for allowance and were allowed by him; among such drafts is alleged, (fol. 15), to be one for $1,998, held by Max Rosenthal, appellant, who is averred to have sued the Metropolitan National Bank in equity, in a cause to which the plaintiff Coates was a party, and it is alleged that the Circuit Court of the United States in New York decreed that Rosenthal was not entitled to payment of his said check out of said funds as against the Metropolitan National Bank or plaintiff, and that said decree is still in force. Certain payments by Coates as as-

signee are described, which reduced the fund, as is averred in the petition, (fol. 16), to $53,730.74. An offer is made to pay the said sum as may be directed by the Court, and for the purpose of avoiding multiplicity of suits and that equal justice may be had in the administration of the trust fund received from the Metropolitan National Bank, the plaintiff prayed the judgment of the Court:

"1st. Whether said fund belongs to the general fund in the hands of the assignee and as such is to be distributed among the general creditors of the Mastin Bank.

"2nd. Whether the holders of the drafts drawn by the Mastin Bank on the Metropolitan National Bank of New York have any lien upon or are entitled to said trust fund, and, if so, in what manner said fund is to be distributed among said draft-holders—whether *pro rata* in the order of the date of the number of drafts, in the order of their presentation for payment to the drawee, or otherwise.

"3d. That the several draft-holders who have commenced and are now prosecuting suits against this plaintiff, as hereinbefore set forth, be enjoined during the pendency of this suit and thereafter perpetually from maintaining or prosecuting said suits." (Record, fol. 18) and for general relief.

On the 11th of October, 1881, Max Rosenthal, the appellant, answered, setting up his ownership of one of the drafts outstanding, amounting to $1,998, admitting that he had made an unsuccessful effort to secure payment of his check by suit in the Circuit Court of the United States, for the Southern District of New York, but averring that the Circuit Court in Jackson County and the United States Circuit Court for the Western District of Missouri, had decided the same question in favor of the holders of the drafts. The answer closes by praying affirmative relief:

"That his said draft for $1,998.00 herewith filed, with protest fees, and interest be received and allowed, and that payment of the same be made out of said fund as may seem to this court just and proper." (Record, fol. 20.)

Plaintiff replied by a general traverse (fol. 31).

It would seem, from these pleadings, that the object of the action was to procure a decree, determining among the several defendants, who was entitled to the money in the hands of the assignee, and in what proportions. There is no direct averment in the petition that the total sum of the claims of the holders of checks was more than the sum received by the plaintiff from the Metropolitan Bank, but by correcting the erroneous addition ($81,884.60, fol. 9), and reducing to the true sum, $54,117.16, it would appear that the fund was $8,269.58 in excess of the drafts, including Rosenthal's. Such may be gathered from the averments of the petition.

Any doubt arising upon this aspect of the case, however, was, at a later day removed, at least as far as the state of account at the date of trial was concerned, by an agreement entered into between counsel, in which, (folio 32), it is admitted:

"that Coates, assignee, at the time of the trial of this cause, had a sufficient fund returned from the Metropolitan National Bank to pay all the outstanding drafts."

The judgment was,

"generally to the effect that all of said draft-holders be paid the amount of their claims in full from the fund received from the Metropolitan Bank, on which the drafts of claimants were drawn." (fol. 32.)

But the Court also adjudged Rosenthal not en-

titled to relief against the plaintiff, or the fund, but reserved to him the right to apply for an allowance of the $1,998 check, as a general claim against trust funds in the hands of the assignee. (fol. 32.)

Rosenthal made a motion for new trial, supporting it by affidavit that the admission of his answer that the decree of the Court of New York was final, was a mistake, and explaining how the mistake occurred. (Folios 33–38). This motion the Circuit Court in Jackson County overruled, February 21, 1882 (fol. 32), whereupon appeals were taken by both Coates and Rosenthal, to the Supreme Court of the State of Missouri, which tribunal, on the 22d day of December, 1884, at the October Term, 1884, reversed the judgment, and remanded the cause to Jackson County Circuit Court, for further proceedings. (See mandate of Supreme Court of Missouri, dated January 29th, 1885, folio 40). This was a reve as to all pa Ins. Co. v. St 71 Mo. 465

During the progress of the cause in the Supreme Court of Missouri, a stipulation was filed in the cause, a copy of which appears in the form of an entry, (fol. 41), by which it was agreed,

"that appellant Coates paid the checks of the Mastin Bank on which judgment was rendered in full and took from respondents their receipts therefor and demanded and received a surrender of said checks, and said Coates filed no supersedeas bond herein."

In this connection it is also proper to call attention to the agreed statement of facts on file in this cause, signed by counsel on both sides, (entitled on cover, "Record, Brief of plaintiff in error,") in which it is stated, at page 3, that:

"From the decree (it being one single decree as to all the defendants), both the defendant, Max Rosenthal, and the plaintiff appealed to the Supreme Court of the State of Missouri; the plaintiff, however, filed no supersedeas bond, and, while the

appeal was pending, paid in full, in accordance with the decree of the lower Court, the drafts of the defendants in whose favor the decree was given, and took their receipts therefor, and demanded and received the surrender of the said drafts."

It is also proper to direct the attention of the Court to the entry made in the case, May 28, 1886, (fol. 31), containing a stipulation, of the second paragraph of which the following is part:—

"it being conceded that the judgment is one entire judgment and that all the other parties thereto have been paid the amount of their claims except said Rosenthal."

This reversal and these payments left the case pending between Coates as plaintiff and Rosenthal as defendant, and without other parties. Thereupon, on February 10, 1885, Rosenthal filed his petition, affidavit and bond for removal of the cause into the Circuit Court of the United States, and upon consideration, the Court approved the bond and ordered:

"that this cause as to defendant Max Rosenthal be transferred to the Circuit Court of the United States in and for the western division of the western district of Missouri" (fol. 22).

The petition for removal, (fol. 23), avers that the petitioner Rosenthal was, at the time the suit was brought, and still is, a citizen of the State of New York and a resident thereof, and that there was, at the time the suit was brought and still is, a separate controversy between the petitioner Rosenthal and the plaintiff, a citizen of the State of Missouri and a resident thereof:

"that there can be a final determination of the

controversy, so far as concerns your petitioner, without the presence of the other defendants as parties hereto.

That said suit is brought by said plaintiff, Kersey Coates, and is in the nature of a bill in equity for the purpose of determining to whom and in what manner he shall pay a fund in his hands held by him as assignee of the Mastin Bank of Kansas City, Missouri, and the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs."

Petitioner further represented that the suit was pending for trial in the Circuit Court for Jackson County, Missouri; that he desired to remove the same to the Circuit Court of the United States in pursuance to the third subdivision of Section 639 of the Revised Statutes of the United States. He accompanied this petition by his own affidavit, as follows (fol. 24):

"I am one of the defendants in the above entitled cause; that I have reason to believe and do believe that from prejudice and local influence the defendant Max Rosenthal will not be able to obtain justice in said State court."

After the removal, and in the Circuit Court of the United States, on May 27th, 1885, Rosenthal amended his answer, (fols. 26-29). The *fourth* paragraph of the amended answer is in the following words:

"That all the other defendants or draft-holders made parties to this suit, or having brought suit, as alleged in plaintiff's bill have been paid the amount of their drafts in full since the commencement of this suit, and that this defendant has been paid neither dividend nor any part of the amount of his said draft."

It was after this (next day) that the entry hereinbefore referred to was made in the Circuit Court,

U. S. (fols. 31-41,) which contains the admission, made in the Circuit Court of Jackson County, that Coates had more than enough money in his hands, (fol. 32.)

" returned from the Metropolitan Bank to pay all the outstanding drafts,"

and had paid them all, except that owned by Rosenthal.

On October 22, 1886, a motion was made by Coates, to remand, (fol. 43,) *first*, because the petition for removal was not filed by Rosenthal, at the time of entering his appearance in said Court; nor before or at the time at which the cause could be first tried or before the trial thereof, nor before the final hearing of said cause; *second*, because the suit is not wholly between a citizen of the State in which it is brought and citizens of other States.

On October 25, 1886, the Circuit Court granted the motion to remand with costs to the Court from which it came, to which ruling the defendant Rosenthal excepted, and appealed to this Court (fol. 44).

Coates, by his attorney, T. A. Frank Jones, entered his appearance in this Court, and waived the issuing of service of citation and notice of appeal (fol. 46). Afterwards, Coates died, and his death having been suggested on the record, proceedings were had by publication in accordance with the first paragraph of the fifteenth rule.

It is proper to add that in the proceedings for the restoration of this cause to the calendar, actual notice in writing was given, (and proved), to T. A. Frank Jones, Esq., and to Teasdale, the successor of Coates, as assignee of the Mastin Bank, of the pendency of such motion. And I am informed that Mr. Jones will appear by brief.

Assignment of Error.

The Circuit Court for the Western District of Misssouri erred in sustaining the motion to remand this cause, and in remanding it to the Circuit Court of Jackson County, Missouri.

Argument.

I.

This case presents a novel question. It would seem as if this Court had long since exhausted all the possibilities of decisions upon questions of removal, placing them in the category to which a famous decision of the Supreme Court of Kansas once pleasantly assigned new questions arising upon the Statute of Limitations. But this cause proves the contrary.

At the time suit was brought, Coates lived in Missouri and Rosenthal in New York. A large number of other parties were united with Rosenthal as co-defendants.

As all parties in interest were adverse to Rosenthal, they might have been assigned their proper place as supporters of Coates, according to the doctrine enunciated in the Removal Cases, (100 U. S. 457), but their residence was not stated in the record. Therefore, it may be true that the case did not in form present a removable controversy, except for the reason of prejudice and local influence, which was the ground upon which it was in fact removed, but the record shows conclusively that the controversy was, in fact, separable, and that the affidavit of Rosenthal by which he procured the removal was true, and that under the doctrine of *Barney* vs. *Latham*, 103 U. S. 205, the case was removable.

This appears thus: Coates, as assignee, repre-

sented all the general creditors. It was admitted in the Circuit Court (fol. 32,) that Coates had money enough on hand, returned from the Metropolitan Bank, to pay all the drafts. There was, therefore, and could be no controversy between Rosenthal and his co-defendants. Each of them had a claim, (to which Coates was the only party interested on the other side,) that a portion of the fund equal to the amount of his claim belonged in equity to him. No one of them had any interest in disputing Rosenthal's claim, and Rosenthal had no interest against them or any of them. There was enough for all. No one of them would have been a proper party to a separate suit against Rosenthal, nor would he have been a proper party to any suit against them or any of them. If this, which was afterwards admitted to be true, had been distinctly stated in the petition, there would have been no doubt that Rosenthal's controversy was not only separable but separate. The petition not only did not in words negative this position, but its correctness can be established by merely adding the figures of the claims upon checks recited in the petition. The apparent addition (fol. 9), fixing their sum at $81,884.60 is a mistake. Including all the figures of outstanding drafts given in folios 6, 7, 8, 9, 10 and 11, the total is only $54,117.16, so that even by construction the contrary can not be spelled out of it.

II.

Even upon the petition in its original form, however, the controversy with Rosenthal is separate and distinct from all others, for as to him it is a bill *quia timet*. It avers that he makes an un-

founded claim upon the fund, that this had been judicially determined against him in the Circuit Court of the United States for the Southern District of New York, and as to him, suit was brought to determine that he had no lien or claim upon the fund. As to the other parties, the object of the suit was by way of interpleader, to determine what amount, if any, each of them was entitled to.

III.

During the pendency of the case in the Supreme Court of Missouri, all parties defendant to the cause, except Rosenthal, were paid by Coates, and the case came back, therefore, from the Supreme Court of Missouri to the Circuit Court of Jackson County, with only two real parties, Coates the plaintiff and Rosenthal the sole defendant.

Under these circumstances Rosenthal removed the cause to the Circuit Court of the United States for the Southern District of Missouri.

It is respectfully submitted that, whatever might have been the formal character of the cause in its original aspect, this change made it a new suit brought by Coates to procure a decree that Rosenthal had no claim on the fund.

Thus the suit became not only a separable but a separate controversy. It is respectfully submitted that whatever might have been the nature of the case in the beginning, this change in its aspect was equivalent to beginning a new action, so far as the rights of the remaining parties were concerned, and that this Court will not go back to the previous contention disposed of by the payment of the other creditors, and the judgment of the Supreme Court of Missouri, for the purpose of defeating Rosenthal's right to remove.

As soon as it became a suit solely between him and Coates, he took the proper steps to remove on the ground of prejudice and local influence.

IV.

This Court has decided that a change of residence during the progress of the suit, so that the parties become citizens and residents of different States, does not entitle the cause to removal. But this has nothing to do with this case. On the other hand, the removal cases establish—

"that the mere form of the pleadings may be put aside, and the parties placed on different sides of the matter in dispute according to the facts. This being done, when all those on one side desire a removal, it may be had, if the necessary citizenship exists."

The case seems to be governed by *Yulee* vs. *Vose*, 99 U. S. 539. The facts are slightly different, but the principle of *Yulee* vs. *Vose* applies in all its force to this case. There Yulee, a citizen of Florida, had been joined with other defendants, citizens of New York, in the suit, in a Court of the State of New York. The case was tried, and there was a judgment in favor of all the defendants, which the Court of Appeals of New York affirmed except as to Yulee, and as to him it was reversed and remanded for a new trial. After the *remittitur* was filed in the Court of original jurisdiction, the cause was pending there in favor of Vose, plaintiff, a citizen of New York, against Yulee, a citizen of Florida, defendant, without

other defendants. In this case, when the mandate of the Supreme Court of Missouri had been filed in the Circuit Court of Jackson County, the debts due to all the other defendants, and upon which they had recovered judgment, had been paid by Coates, and the cause stood as one between Coates, a citizen of Missouri, plaintiff, and Rosenthal, a citizen of New York, defendant.

After the *remittitur* was filed in the Supreme Court of New York (the court of original jurisdiction), but before any new trial had as ordered by the Court of Appeals, Yulee filed a petition for removal. So here, after the cause had been redocketed in the Circuit Court of Jackson County in obedience to the mandate of the Supreme Court, and had become an action between Coates and Rosenthal, from which all other parties in interest had been discharged by payment, Rosenthal filed his petition, bond, &c., and secured its removal to the Circuit Court of the United States.

Not only are the facts in close analogy, but the principle stated by this Court applies directly. Chief Justice WAITE says (p. 545):

"The evident purpose of the act of 1866 was, to relieve a person sued with others in the Courts of a State of which he was not a citizen, by one who was a citizen, from the disabilities of his co defendants in respect to the removal of the litigation to the Courts of the United States, if he could separate the controversy, so far as it concerned him, from the others, without prejudice to his adversary. In view of the fact that sometimes in the progress of a cause circumstances developed themselves which made such a transfer desirable, when at first it did not appear to be so, the right of removal in this class of cases was kept open until the trial or final hearing, instead of being closed after an entry of appearance, as was the rule under the Act of 1789. We think this gives such a party the right of removal at any time before trial, when the necessary

citizenship of his co-defendants is found to exist and the separation of his interest in the controversy can be made. There is nothing in the act to manifest a contrary intention, and this construction does no more than give the party to whom this new privilege is granted an opportunity of availing himself of any circumstances that may appear in his favor previous to the time when he is called upon finally to act. * * * But here a party otherwise entitled to a removal is embarrassed by the presence of those whom he cannot control. In view of this, the time of making his election is extended until he is brought to trial; and it is not at all in conflict with that case to say that he may avail himself of his release from the operation of the disabilities growing out of his joinder in the action with other defendants, whenever that release occurs, if before trial or final hearing, as to him."

In *Putnam* vs. *Ingraham*, 114 U. S. 57, it was contended that there could be a removal by one of two defendants if the other were in default.

Chief Justice WAITE (p. 59), said:

"The fact that Morgan has not answered, but is in default, is unimportant. The suit is still on joint causes of action, and the plaintiff, if he sustains the allegations of his complaint at the trial, will be entitled to a joint judgment against all the defendants. The default places the parties in no different position with reference to a removal than they would occupy if Morgan had answered and set up an entirely different defence from that of the other defendants. A separate controversy is not introduced into the case by separate defences to the same cause of action."

It is obvious that this has no application to the present case.

Brooks vs. *Clark*, 119 U. S. 502, was an action upon a joint cause of action against Josiah D. and Charles H. Brooks. Josiah D. Brooks, having been served with process, failed to appear, and after assessment of damages, judgment was entered

against him, which, according to the practice in Pennsylvania, was final.

At the time this judgment was thus taken, Charles H. Brooks had not been served with process. At a later date he appeared, and removed the cause to the Circuit Court of the United States, by which it was remanded to the State Court.

Upon a writ of error to this Court, counsel for plaintiff in error relied upon *Yulee* vs. *Vose*. Chief Justice WAITE distinguishes the two cases, by holding that the facts of *Brooks* vs. *Clark* presented the case of a joint action, in which the judgment, if rendered against Charles H. Brooks, would not be in another, but in the same suit, and would not be essentially different, except in date, from the judgment against Josiah D. Brooks.

Chief Justice WAITE says (p. 510 :)

"This is a proceeding in the original suit and on the original cause of action. If a judgment shall be rendered against Charles H. Brooks, it will be a judgment in the original action, the same in all respects, except as to date, that it would have been if he had been served with process, and had put in the same defence before the judgment against Josiah D. Brooks. He voluntarily appeared 'in the same suit' by accepting service of the original summons, but with an extension of time to put in his personal defence. Had the same thing been done before the judgment against Josiah D. Brooks, there could have been no removal on the petition of Charles H. Brooks, or on the petition of all the defendants, because the suit would have been against the two defendants, one of whom was a citizen of the same State with the plaintiff, and a separate defence by one. This, it has often been held, would not show or create a separable controversy within the meaning of the removal act. * * * It is true there is now no longer any controversy upon the original cause of action with Josiah D. Brooks, against whom a final judgment has already been rendered, but neither was there in *Putnam* vs. *Ingraham*

(*supra*) with the defendant, Morgan, who was in default, and made no defence. In this respect the two cases differ only in degree and not in kind. In this case the proceedings had gone one step further than in the other, and the default of Josiah D. Brooks had been fixed by the judgment. In principle, however, the cases are alike."

On page 512, Chief Justice WAITE distinguishes the case of *Yulee* vs. *Vose*, thus :

"In *Yulee* vs. *Vose* there were several causes of action embraced in the suit—some joint against Yulee and all the other defendants, and one against Yulee alone as the endorser of certain promissory notes. Upon a trial, judgment had been rendered in favor of all the defendants upon all the causes of action. This judgment was affirmed by the highest Court of the State as to all the causes of action, except that against Yulee alone as endorser. As to that it was reversed and the cause sent back for a new trial. It was under these circumstances that it was said 'it appeared that the controversy, so far as it concerned Yulee, not only could be, but actually had been, by judicial determination, separated from that of the other defendants'; and a removal of this controversy thus actually separated from the rest of the case, was directed upon the petition of Yulee, filed after the case had been sent back for trial as to him alone and before the trial or final hearing which was in time under that statute. Upon this removal only the separate controversy with Yulee was carried to the Circuit Court, and the judgment in that would have no connection whatever with the other parts of the case which remained undisturbed in the State Court where the record continued, so far as they were concerned."

The fact that the payments which ended the controversy in the present case were made in accordance with the judgment of the Circuit Court of Jackson County (which was afterwards reversed), has no significance.

If the Supreme Court of Missouri had affirmed the judgment in favor of the other draft holders, and reversed that against Rosenthal, the present case would have been exactly like *Yulee* vs *Vose*. That the voluntary action of Coates put an end to the controversy, so far as all other parties are concerned, is not a distinguishing fact. It does not remove this case beyond the control of the decision in *Yulee* vs. *Vose*, for in this case the causes of action, as in *Yulee* vs. *Vose*, were separable, and the payments having put an end to all other controversies, as fully as if so judicially adjudged, there could and did remain nothing for judicial consideration, except the controversy pending between Coates and Rosenthal.

The decision of this, if in the State Court, would, it is quite true, have been in the original cause, but it would be upon a separate cause of action, separately stated in the petition, and with which the other defendants really had in the beginning no connection, and now turn out to be admissions made after the entry.

If, upon the coming down of the mandate from the Supreme Court of Missouri, Coates had discontinued the action as against all the other defendants, or the Circuit Court of Jackson County had dismissed his petition as to them, without prejudice, could any one say that the case against Rosenthal was not in the nature of a separate controversy, and that such action would not judicially settle all matters of complaint referred to in the petition except that remaining between Coates and Rosenthal? If not, how distinguish this case from *Yulee* vs. *Vose*, except in the circumstance that there is no judgment here of affirmance, although there is its equivalent, payment by Coates to the other defendants. What could Coates have done after the

voluntary payments which discharged his liability and ended the controversy between him and the other defendants, towards enforcing the rights asserted in the complaint against them? The reversal in the Supreme Court of Missouri could avail him nothing—*volenti non fit injuria.* He had seen fit to put an end to the controversy by omitting to give a supersedeas bond, and by submitting to the judgment of the Circuit Court in Jackson County, by paying the other defendants. Could he afterwards claim to take any proceedings in the pending action? Even if he might have sued for the return of the money, would it not necessarily be a separate and distinct suit? Could he have asked any order which would have enabled him to collect the money, thus voluntarily paid in this action? Was not this action as completely and definitely ended by the judicial judgment of the Circuit Court of Jackson County, obeyed and submitted to by Coates, as if he had not sued out a writ of error to reverse the same, but had taken no further proceedings?

In *Scholey* vs. *Halsey*, 72 N. Y., 578, it was held that the remedy of a party who had paid money upon an erroneous judgment or decree of a Surrrogate was, after reversal, to demand restitution, and upon refusal, to bring an action to recover back the money; that it is not necessary to the right of action, that such payment should have been coerced by execution. But the Court of Appeals held demand and refusal essential to entitle the plaintiff to recover.

To the same effect is the opinion of Mr. Justice FIELD in *South Fork Canal Company* vs. *Gordon*, 2 Abb. U. S. 479. I quote two passages from his opinion:

"The restoration *in specie* in such cases being impossible without infraction of the principle by

which judgments of courts are upheld and enforced, it follows that the right which the reversal gives must be that of action to recover an equivalent for the lost thing." (page 488–9).

"Perhaps the rule may be stated thus: That the defendant or unsuccessful party in the Court below is to be restored by reversal to all things which he lost by the erroneous judgment or decree, * * * and in such case he is to have a right of action for a money equivalent." (page 489).

This case is not at all like *Northwestern Fuel Company* vs. *Brock*, 139 U. S. 216. There payment of the amount of the judgment was enforced by supplementary proceedings in aid of execution. Here the amounts found in favor of the defendants were voluntarily paid pending appeal.

But even if it be admitted that the case survived as between the other defendants, as to whom the Supreme Court of Missouri had reversed, and Coates, its condition conclusively demonstrates (1) that the controversy was from the beginning separable as far as Rosenthal is concerned, and (2) it also shows that at the time of the removal the controversy was not only separable but separate, being divisible into two distinct parts, (A) a claim by Coates to recover back the moneys he had improvidently paid to the other defendants; (B) another demand *quia timet* by him against the prosecution of any claim by Rosenthal.

All which is respectfully submitted.

New York, February 3d, 1893.

GEORGE HOADLY,
Of Counsel for Max Rosenthal,
Appellant.